No. 2453

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. G. HENRY,

Plaintiff in Error,

VS.

TACOMA RAILWAY & POWER COMPANY, a corporation,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division

STANLEY BELL PRINTING CO., TACOMA

No._____

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Names and Addresses of Attorneys

ANTHONY M. ARNTSON, Esquire,
614 Fidelity Building, Tacoma, Washington,
and
T. W. HAMMOND, Esquire,
614 Fidelity Building, Tacoma, Washington.
Attorneys for the Plaintiff in Error.

JOHN A. SHACKLEFORD, Esquire,
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and
FRANK D. OAKLEY, Esquire,
Perkins, Building, Tacoma, Washington,
Attorneys for the Defendant in Error.

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,
Plaintiff in Error,
vs.
TACOMA RAILWAY & POWER COMPANY, (a corporation),
Defendant in Error.
No. 1262

Praecipe for Transcript

To the Clerk of the Above Entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error to said Court, including the following pleadings, proceedings and papers, to-wit:

Complaint;

Order approving bond and removing cause to United States District Court;

Answer to complaint;

Reply to answer;

Verdict;

Judgment;

Petition for new trial (not affidavits);

Stipulation continuing hearing on petition for new trial;

Bill of Exceptions as settled by the court, with order settling same;
Defendant's Exhibits A, B, C and G;
Assignment of Errors;
Petition for Writ of Error;
Order allowing Writ of Error;
Bond on writ of error and approval of same;
Writ of Error;
Citation;
And all admissions of service and endorsements on same.
Also Clerk's certificate.

ANTHONY M. ARNTSON,
T. W. HAMMOND,
Attorneys for Plaintiff in Error.

(Endorsed) :—

"FILED IN THE
U. S. DISTRICT COURT
Western District of Washington,
Southern Division,
JUL 22 1914
FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy."

In the Superior Court of the State of Washington, for the County of Pierce.

M. G. HENRY,
Plaintiff,
vs.
TACOMA RAILWAY & POWER COMPANY, (a corporation),
Defendant.

Cause No. 33941
Dept. No. ------

Complaint

The plaintiff, M. G. Henry, complains of the defendant, Tacoma Railway and Power Company, and alleges:

I.

That at all the times hereinafter mentioned the defendant was and that it now is a corporation, having its principal office and place of business in the city of Tacoma, in Pierce County, State of Washington, doing business as a common carrier of passengers for hire, and as such operating, through its servants and employees, a system of street railways in said city, including a line on Pacific Avenue at and past its intersection with south twenty-first street, under and by virtue of franchises granted by said city.

II.

That on the sixth day of April, 1911, at about the hour of eleven o'clock, A. M., one of the defendant's

passenger cars then in use in defendant's said business, was brought to a stop and held stationary for some seconds of time at its usual stopping place at said intersection of Pacific Avenue and twenty-first street, for the purpose of permitting several passengers, including the plaintiff, to enter. That as soon as said car was so stopped the plaintiff proceeded to enter it, and that his intention so to do was at all of the times herein mentioned known to the defendant's employees in charge of said car, or would have been so known to them had they exercised due care in the operation of said car. That said car was of unsafe construction, in that the entrance was in the middle thereof, and in front of the rear trucks.

III.

That as the plaintiff was so entering said car climbing upward on the steps thereof with one hand grasping a hand-hold thereon, said car was, by and through the carelessness, negligence and incompetency of the defendant's servants and employees, knowingly and negligently intrusted by said defendant with the operation thereof, started forward with a sudden jerk, without any warning to the plaintiff, whose position as above described was then known to the defendant's said servants and employees, or would have been known to them had they exercised due care in the operation of said car.

IV.

That the starting forward of said car, as aforesaid, was wholly unexpected by the plaintiff, and caused him to lose his balance and footing, and

swung him around and off his feet, and struck his head and body violently against the side of the car, with such force as temporarily to deprive him of the control of his faculties. That in an instant, and before the plaintiff was able to realize his predicament or to release his hold of said hand-hold or to take any action for his own protection, his body was, by the continued forward motion of said car, swung inward, toward the rear trucks of said car, close to the track rail; and that in order to avoid great injury it became necessary for the plaintiff to retain his hold on said hand-hold and to drag himself back upon the steps of the car; and that such course appeared to the plaintiff to be necessary to avoid the impending danger.

V.

That the plaintiff, in a dazed condition resulting from said blow and the shock of said accident, and in the face of the imminent danger aforesaid, retained his hold upon said hand-hold and attempted to regain his footing on the steps of said car, in an effort to save himself from further injury, and after struggling for several seconds did succeed in regaining said steps, and, climbing them, entered said car.

VI.

That from the time said car so started forward until the plaintiff regained said steps, as aforesaid, said car, by the carelessness and negligence of the defendant's said servants and employees, continued its forward movement, with ever increasing speed,

dragging the plaintiff along the rough pavement and making it impossible for him to gain a footing upon the pavement; that during all of said period the plaintiff's situation as above described was well known, or by the exercise of reasonable care, caution or diligence would have been known, to the said servants and employees of the defendant, and that by the exercise of reasonable diligence and care the said servants and employees of the defendant could, during said period, have stopped said car, and thus have enabled the plaintiff to release his hold and drop to the pavement without danger of being run over by said wheels or trucks.

VII.

That said accident, and the shock and strain incident thereto, caused ruptures in the plaintiff's stomach and intestinal tract, and severe injuries to his head, shoulder, arm, side and back, and various painful bruises and contusions, and resulted in the permanent derangement of his nervous system and of his digestive organs, and a serious disturbance of the control over his vital organs, and an impairment of his hearing, and other serious injuries. That by reason of said injuries plaintiff has lost the capacity for enjoying the usual pleasures of life; that the outward manifestations of his said afflictions attract the attention of the curious, and make him an object of pity, and even of ridicule and subject him to humiliation, vexation and annoyance; that at all times since said accident the plaintiff has suffered great physical and mental pain and

anguish by reason of said injuries, and his condition of health resulting therefrom, and that he must during the remainder of his life continue so to suffer; all as the result of defendant's negligence, as herein alleged.

VIII.

That at the time of said accident and injury the plaintiff was a man forty-two years of age, of robust health and strength, with a natural expectation of life of twenty-six years. That at said time he was employed as a bond buyer and office man at a monthly salary of one hundred dollars, with a certainty of early advancement and increase in pay and capable of earning a much larger salary. That at said time he had an extensive and intimate knowledge of the business of buying and selling bonds, mortgages and other securities, and of all the intricacies of the business of a financial agent or banker, and possessed especial skill in such business, and that at said time he had and that he has since had (subject to the condition of his health) opportunities to engage in said business as a principal, with a certainty of profits greatly in excess of the salary above named. That during most of the time from the time of said accident to the first day of August, 1911, the plaintiff reported for work and did such work as he was able to perform, in order to retain his said position, although constantly in great pain. That by reason of said injuries and his condition resulting therefrom as herein described he was unable at any time during

said period to perform his work in a satisfactory manner, as theretofore, and that on said first day of August, 1911, by reason of his condition of health, resulting from said injuries, he was discharged from his employment. That since said first day of August, 1911, he has been unable to hold any position, but has attempted to assist in conducting a business such as above described, for the support of his family and himself, but that by reason of his rapidly failing health, caused by said injuries, he has been and is and will be unable to perform the labor and duties necessarily devolving upon him in connection therewith, and that as a result of his said condition his personal efforts are unprofitable, and it will be impossible during the balance of his lifetime for him to perform any labor or to hold any employment or to conduct any business or to earn any money for the support of his family or himself.

IX.

That from the time of said accident to the time of the commencement of this action said plaintiff has incurred reasonable expenses for medical services and attendance, medicines and incidental expenses, all of which have been rendered necessary solely by reason of said injuries, to an amount aggregating $570.00, and that it will be necessary during all the balance of his life to expend large sums of money for additional medical and surgical services and attendance and medicines.

X.

That the dragging of the plaintiff's body along the pavement by said car, as above described, destroyed the plaintiff's overcoat, which was then of the reasonable value of $35.00, and also caused to be thrown from the plaintiff's pocket and lost the plaintiff's gold watch, which was then of the reasonable value of $50.00, and the plaintiff's fountain pen, which was then of the reasonable value of $5.00.

XI.

That all of said injuries, and all of said humiliation, pain and suffering, physical, nervous and other impairment and derangement, loss of earning capacity, and other losses, expenses and disbursements above described, have resulted and will result to the plaintiff wholly from the carelessness, negligence and fault of the defendant, in the use of said car of unsafe construction, and in the employment of said incompetent servants, and the careless and negligent acts of said employees and said defendant, and otherwise, as aforesaid; and that the plaintiff has been damaged thereby in the full sum of Fifty Thousand Dollars.

WHEREFORE plaintiff prays judgment against the defendant in the sum of Fifty Thousand Dollars, and for his costs and disbursements herein, and for such other and further relief as to the Court may seem just.

M. G. HENRY,
Plaintiff.

ANTHONY M. ARNTSON,
Attorney for Plaintiff.
P. O. Address: Room 614 Fidelity Bldg., Tacoma, Pierce County, Washington.

STATE OF WASHINGTON } SS:
County of Pierce }

M. C. Henry, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Complaint, that he knows the contents thereof and that he believes the same to be true.

M. G. HENRY.

Subscribed and sworn to before me this 26th day of November, 1912.

ANTHONY M. ARNTSON,
Notary Public in and for the State of Washington, residing at Tacoma, in said County.

Filed in Superior Court.
Nov. 27, 1912.
E. F. McKenzie, Clerk.
By G. F. M. Deputy.

"FILED
U. S. DISTRICT COURT
Western District of Washington
JAN 17 1913
FRANK L. CROSBY, Clerk
E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

No. 33941

Order Approving Bond and Removing Cause to United States District Court

This cause coming on duly and regularly to be heard this 19th day of December, 1912, upon the petition of the defendant, Tacoma Railway & Power Company, for the removal of this cause from this Court to the United States District Court for the Western District of Washington, Southern Division, and it appearing to the Court that written notice of this Petition and hearing and of the Bond for removal filed herein has been given to the plaintiff herein prior to the filing of said petition and Bond, and it appearing to the Court from said petition that said suit is entirely between citizens of different states, and that the amount in controversy in said action exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3000.00), and the petitioner having filed and tendered with their said petition a Bond with good and sufficient surety in the sum of Five Hundred Dollars ($500.00) con-

ditioned as required by law, and being advised in the premises,

IT IS ORDERED, that this court proceed no further in this cause, and that the same be and hereby is removed to the District Court of the United States for the Western District of Washington, Southern Division, and that the Clerk of this Court be and he hereby is ordered and directed to prepare a record herein and to certify and transmit the same to the Clerk of the United States District Court for the Western District of Washington, Southern Division, within thirty days from the date of the filing of said petition.

DONE in open Court this 19th say of December, 1912.

ERNEST M. CARD,
Judge.

Ent'd Jour. 133 Page 525 Dept. 4
12-19, 1912.

Filed in Superior Court.
Dec. 19, 1912.
E. F. McKenzie, Clerk.
By J. J. E. deputy.

"FILED
U. S. DISTRICT COURT
Western District of Washington
JAN 17 1913
FRANK L. CROSBY, Clerk.
E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

Answer

The defendant for answer to the complaint of the plaintiff filed herein, alleges and says:

I.

For answer to paragraph two of the said complaint, defendant admits that on or about the 6th day of April, 1911, at 11:00 o'clock A. M. of said day, one of defendant's passenger cars, then in use in defendant's business, was brought to a stop and held stationary for some seconds of time at its usual stopping place at said intersection of Pacific Avenue and 21st street, for the purpose of permitting passengers to enter the same, but this defendant denies each and every other allegation in said paragraph contained.

II.

For answer to paragraphs three, four, five, and six of said complaint, this defendant denies the same and each and every allegation therein contained.

III.

For answer to paragraph seven of said complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts therein contained and therefore denies the same.

IV.

For answer to paragraph eight of said complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

V.

For answer to paragraph nine of said complaint, this defendant says, it has no knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same, and particularly denies that plaintiff has been damaged in or expended the sum of $570.00, or any other sum whatever.

VI.

For answer to paragraph ten of said complaint, this defendant says it has no knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same, and particularly denies that plaintiff has been damaged in the sum of $90.00 as therein alleged.

VII.

For answer to paragraph eleven of said complaint, this defendant says it denies the same and each and every allegation therein contained, and particularly denies that plaintiff was injured in the sum of $50,000.000, or any other sum whatever.

Further answering and as a further, separate and first affirmative defense, this defendant alleges:

I.

That the accident hereinabove admitted to have occurred, was occasioned by reason of the careless and negligent conduct of the plaintiff himself, and nototherwise, in that he heedlessly, recklessly, and carelessly, attempted to board one of defendant's cars while the same was in motion; that it was contrary to the rules and orders of the defendant company for passengers to attempt to board moving cars, and that in violation of the orders of the defendant company, the said plaintiff attempted to get on board said car by jumping upon the steps thereof after the said car had been set in motion, and without the knowledge, consent, or permission of the employes of defendant in charge of said car. That any injuries plaintiff may have received as alleged in his complaint, were caused by his refusal to obey the rules and orders of the defendant company, and were caused solely by his own wilful, careless, and negligent conduct, and not otherwise, and that plaintiff by attempting to board said moving car assumed all risk and danger of being injured while so doing.

WHEREFORE defendant prays that said action be dismissed and that it go hence with its costs and disbursements herein to be taxed.

J. A. SHACKLEFORD.
F. D. OAKLEY,
Attorneys for Defendant.

* * * *

UNITED STATES OF AMERICA,
Western District of Washington. } SS.

F. D. Oakley, being first duly sworn on oath deposes and says: that he is one of the attorneys for the defendant company in the foregoing answer named; that the same is a foreign corporation and he makes this verification for and on its behalf, being authorized so to do; that he has read said answer, knows the contents thereof, and that the same is true.

F. D. OAKLEY.

Subscribed and sworn to before me this 14th day of Feb. 1913.

F. D. METZGER.

(Notarial Seal) Notary Public in and for the State of Washington, residing at Tacoma, in said State.

Due service of the within and foregoing ——— by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 14th day of Feb. 1913.

A. M. ARNTSON.
For Pltff.

"FILED
U. S. DISTRICT COURT
Western District of Washington
FEB 14 1913
FRANK L. CROSBY, Clerk.
E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

Reply

The plaintiff replies to the "Further, Separate and First Affirmative Defense" contained in the defendant's Answer as follows:—

I.

He admits that said accident occurred, and that he was injured thereby, all as alleged in his complaint herein; he denies that he has any knowledge or information sufficient to form a belief as to whether said defendant company has or ever had any rule or order, as alleged in said answer, or otherwise or at all; and denies each and every other allegation therein contained.

II.

Plaintiff further alleges that if said defendant ever had any such rule or order, as alleged in said answer, the existence and purport of the same have at all times been wholly unknown to the plaintiff, and that he has at no time had any knowledge or notice thereof. And further, that if any such rule

or order existed, the same was unnecessary and unreasonable, and not binding upon this plaintiff.

WHEREFORE plaintiff prays judgment as in his complaint herein.

M. G. HENRY.
Plaintiff.

ANTHONY M. ARNTSON.
Attorney for Plaintiff.

STATE OF WASHINGTON, } SS.
County of Pierce.

M. G. HENRY, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing reply, that he knows the contents thereof, and that the same is true.

M. G. HENRY.

Subscribed and sworn to before me this 28th day of February, 1913.

ANTHONY M. ARNTSON.
(Notarial Seal) Notary Public in and for the State of Washington, residing at Tacoma.

Received a copy of the within Reply, service whereof is admitted this 1st day of March, A. D. 1913.

J. A. SHACKLEFORD.
F. D. OAKLEY.
Attorneys for Defendant.

"FILED
U. S. DISTRICT COURT
Western District of Washington
MAR 1 1913
FRANK L. CROSBY, Clerk.
E. C. ELLINGTON, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,
Plaintiff,
vs.
TACOMA RAILWAY & POWER COMPANY, (a corporation),
Defendant.
No. 1262

Verdict

We, the jury empanelled in the above entitled cause, find for the defendant.

M. C. LOWRY,
Foreman.

(Endorsed):—

"FILED
U. S. DISTRICT COURT
Western District of Washington
NOV 1 1913
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy Clerk."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

No. 1262

Judgment

This cause came on regularly for trial in the above entitled court in the Federal Building, at Tacoma, Washington, on the 28th, 29th, 30th and 31st days of November, 1913, before the Hon. E. E. Cushman, Judge presiding, and a jury. Anthony M. Arntson Esq. appearing as counsel for the plaintiff and Messrs. John A. Shackleford and F. D. Oakley appearing as counsel for the defendant; the case was tride before the court and jury and after the introduction of evidence on the part of the plaintiff and on the part of the defendant, the cause was submitted to the jury under instructions by the court; after deliberation the jury returned to the court and reported a verdict in favor of the defendant, Tacoma Railway & Power Company, and upon motion of John A. Shackleford and F. D. Oakley, attorneys for the defendant,—

IT IS HEREBY ORDERED, that judgment be and the same is hereby rendered in favor of the

defendant, Tacoma Railway & Power Company, and against the plaintiff, together with its costs and disbursements in this action to be taxed according to law.

DATED Nov. 18, 1913.

(Signed) EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Nov. 18, 1913.
FRANK L. CROSBY, Clerk.
F. M. HARSHBERGER, Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY, Plaintiff,
vs.
TACOMA RAILWAY & POWER COMPANY, (a corporation), Defendant.
No. 1262

Petition for New Trial

Now comes M. G. HENRY, the plaintiff in the above cause and, upon the reporter's transcript of his shorthand notes, the affidavits of Edward J. Scott, M. G. Henry and Anthony Arntson herewith filed, the minutes of the court, the bill of exceptions and all and singular the pleadings, files, documents and proceedings in said cause remaining, makes and

files this, his petition for a new trial, for the following causes materially affecting his substantial rights in said action viz:

I.

Irregularity in the proceedings of the court by which plaintiff was prevented from having a fair trial.

II.

Newly discovered evidence material for the plaintiff which he could not with reasonable diligence have discovered and produced at the trial.

III.

Errors in law occurring at the trial, which your petitioner specifies as follows, to-wit:

(a) The Court erred in rejecting the testimony of plaintiff that, in consequence of the injury of which he complains in this action, while walking upon the public streets, he would slide or shoot toward people, who would stick out their elbows and dig him in th eside, and that, several times, "Miserable whelps" had actually struck him hard (See Bill of Exceptions, 3 to 5);

(b) The court erred in refusing to permit the witness OWEN A. ROWE to answer the following question, viz:

"Will you state whether, in your opinion, Mr. Henry was a good bond buyer." (See Bill of Exceptions, 17);

(c) The court erred in excluding the testimony offered to be given by the witness OWEN A. ROWE to the effect that the plaintiff was a thoroughly com-

petent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars. (See Bill of Exceptions, 17, 18);

(d) The court erred in refusing to permit the witness MRS. M. G. HENRY to testify concerning what was said to her by plaintiff in the evening following the accident on his arrival home in Seattle, concerning the causes of his condition at that time. (See Bill of Exceptions, 20.);

(e) The court erred in refusing to permit the witness H. R. PRATT to answer the following question, viz:

"Is that interest to continue?" (See Bill of Exceptions, 28);

(f) The court erred refusing to permit the witness H. P. PRATT to answer the following question, viz:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?" (See Bill of Exceptions, 28);

(g) The court erred in rejecting the testimony of the witness H. P. PRATT, offered by plaintiff that, "by reason of plaintiff's condition—his inability to do business and to travel about as demanded by the business" of the firm of which plaintiff and the witness were members, "matters have progressed to a point where they," the other members of the firm, "have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a

short time, when he must sever his connection with" the business of the firm. (See Bill of Exceptions, 28 to 29, inclusive);

(h) The court erred in instructing the jury, in connection with the matters referred to in the specification "(g)" aforesaid, as follows:

"There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carried others around for pleasure excursions, himself. Counsel must be careful and not be continually fluttering around the border line of what is objectionable, in trying to get it in one way or another." (See Bill of Exceptions, 29; Transcript of Reporter's Notes, 147);

(i) The court erred in instructing the jury in the course of the trial, in connection with the matters referred to in the specifications "(g)" and "(h)" above set forth, as follows, viz:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by this offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it; and, therefore, the remark was made." (See Bill of Exceptions, 29-30; Transcript of Reporter's notes, 147);

(j) The court erred in refusing to permit the

witness MARTIN MATHIESON to answer the following question, viz:

"I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?" (See Bill of Exceptions, 52);

(k) The court erred in refusing to instruct the jury as follows, viz:

"It is admitted by the pleadings in this case that, at the time alleged, one of the defendant's cars stopped to take on passengers, and that an accident occurred; and, if you shall find from the evidence that plaintiff was at the car before it again started, for the purpose of boarding it as a passenger, and that as he was about to get on, the car was started, and, in consequence thereof, he was injured, the defendant is liable, unless you shall believe from the evidence that the agents of the defendant in charge of the car exercised the highest degree of care and diligence to ascertain his danger and avoid the accident consistent with the operation of the car."

(l) The court erred in refusing to instruct the jury as follows, viz:

"The law presumes that, at the time of the accident, plaintiff was exercising all the care for his own safety that would be expected of persons of ordinary prudence in boarding the car under the circumstances disclosed; and, in the absence of evidence sufficient to satisfy you that he was not in

the exercise of such care, the burden rests upon defendant to prove that its whole duty to plaintiff was performed and that the injury was unavoiable by human foresight."

(m) The court erred in refusing to instruct the jury as follows, viz:

"It was the duty of the conductor in charge of this car to allow persons offering themselves as passengers a sufficient time in which to board the car and reach a place of safety upon it; and, if you shall believe from the evidence, that a reasonable time was not allowed to plaintiff to get to a place of safety on the car, and that by reason of the failure of such conductor or other persons engaged in the operation of the car to allow plaintiff such reasonable opportunity to board the car, he was injured, defendant is liable.

(n) The court erred in refusing to instruct the jury as follows, viz:

"Not only was it the duty of defendant's agents to allow plaintiff a reasonable time in which to board the car, if he was present at the time it stopped or before it started for the purpose of getting on, but it was their duty to see to it that the car was not started again while the plaintiff was in the act of getting on or off in a place where he would be exposed to danger in case the car were to be moved. In other words, stopping the car a reasonable time to allow plaintiff to get on to it would not of itself be sufficient, but it was the duty of the conductor to see and know that the plaintiff was not

either in the act of boarding the car or in a dangerous position in case the car should move before starting the car; and, if he failed in that duty, and plaintiff was injured, defendant is liable."

(o) The court erred in refusing to instruct the jury as follows, viz:

"The defendant is held to the highest degree of care, skill, and diligence for the safety of persons about to board its cars consistent with the conduct of its business. This car was under the control of the agents of defendant and they were bound to know, if by the exercise of extraordinary care, caution, and diligence they could know whether plaintiff was attempting to board its car at the time of the accident, before permitting the car to start in such manner as would be liable or likely to injure him, and if, in consequence of even slight neglect in the performance of such duty, plaintiff was hurt, defendant is liable."

(p) The court erred in refusing to instruct the jury as follows, viz:

"Sound public policy requires that street car companies be held to the strictest diligence and care to prevent injury to persons while getting upon their car as passengers; and if you shall believe from the evidence that, before starting this car, the conductor did not do all in his power, consistent with performance of his other duties upon it, by looking, listening, inquiring, or otherwise, to ascertain whether plaintiff was present and in the act of getting on, or was where he would be liable or likely

to be hurt, and to avoid injuring him, and that, in consequence of the failure of the conductor to discharge his full duty in that respect, plaintiff received the injuries complained of by him, defendant is liable."

(q) The court erred in refusing to instruct the jury as follows, viz:

"In boarding the car, plaintiff was bound to use only such care as a ordinarily prudent man might be expected to use under like circumstances in view of the probable danger in doing so; and, in determining whether, in this instance, he did experience such care, you should take into account the circumstance that the conductor owed to the plaintiff the highest practicable degree of care to avoid injuring him, and that plaintiff was entitled to expect the conductor to perform such duty."

(r) The court erred in refusing to instruct the jury as follows, viz:

"If you shall believe from the evidence that, in taking hold of this car and holding to it, if he did not take hold of it and hold on as he has testified, the plaintiff did not exercise all the care to be expected of an ordinarily and cautious and prudent person to exercise, but, nevertheless, shall believe that the injury to him, if any, was due to a sudden movement of the car, unexpected by him, brought about by the failure of those in charge of the car to ascertain his position and danger before putting the car in motion, and that, by the exercise of extraordinary care and diligence on the part of such

persons, consistent with the operation of the car, the accident could have been avoided, the defendant is liable."

(s) The court erred in refusing to instruct the jury as follows, viz:

"If you shall find from the evidence that the injury complained of was inflicted and was due to the failure of the conductor or other persons in charge of the car to exercise the highest diligence and care to avoid it practicable to be exercised, the defendant is liable unless you shall further find from the evidence that plaintiff failed to use the care for his own safety generally exercised by persons of ordinary caution and prudence under like circumstances in getting or attempting to get upon such a car; and, even then, if you believe from the evidence that such failure to exercise care on the part of plaintiff was merely the remote, and the want of care and diligence on the part of the agents of defendant was the direct and immediate cause of the accident, defendant is liable."

(t) The court erred in refusing to instruct the jury as follows, viz:

"In this class of cases, the fact that plaintiff was injured without apparent fault on his part, is sufficient to establish negligence of defendant, and to cast upon it the burden of proving, that the injury could not have been avoided by human foresight; and, if you believe from the evidence, that plaintiff, when attempting to board this car, did what men of ordinary prudence usually do under like circum-

stances, and was, nevertheless, injured, unless you are further satisfied from the evidence that the agents of defendant in charge of the car did everything in their power consistent with their other duties that human foresight could suggest to ascertain the presence and situation of plaintiff, and to avoid injuring him, your verdict must be for plaintiff."

(u) The court erred in refusing to instruct the jury as follows, viz:

"If you shall believe from the evidence that, by reason some disease or condition, inherited by plaintiff or otherwise acquired, he was at the time of the accident already predisposed to nervous affections or diseases such as he exhibits at this time, if he exhibits any, such fact will not of itself excuse the defendant, or render it less liable in this action. The cars of the defendant are not operated for the sole use of healthy persons, but for the use of all persons without regard to their physical or hereditary weaknesses; and the defendant is chargeable with notice that persons of different bodily conditions and predispositions to disease will board their cars. It is reasonable to be expected that, in certain cases, if an injury happen to a person already predisposed to affections of diseases of nervous system, such injury may cause such affections or diseases to develop, or, if at the time of the injury such affections or disease have already developed, that the cure of them may be retarded or prevented entirely by the hurt."

(v) The court erred in refusing to instruct the jury as follows, viz:

"If you shall find for plaintiff, and that his present condition is the natural result of his injuries, he is entitled to recover such sum as, in your judgment, under all the circumstances disclosed by the evidence, will fairly compensate him."

(w) The court erred in refusing to instruct the jury as follows, viz:

"In case you shall find for plaintiff, he is entitled to be made good, so far as money can do it, for any damages he may have suffered, and, in considering the sum to be awarded him, you should take into account every circumstance proven to your satisfaction by the evidence, tending to show a damage to him which you believe to be the natural and proximate result of the injuries suffered by him, including—

—a—Any pain he may have suffered or will probably be suffered by him in future resulting from the injury;

—b—Any mental distress he may have suffered or is likely to suffer in future resulting from the injury, such as a sense of humiliation or mortification caused by the acts or conduct of persons whom he has met or may meet induced by his appearance and condition arising from his injury;

—c—Any anxiety or danger he has been or may be subjected to because of the conduct of dogs induced by his appearance or acts arising from his injury;

—d—Any loss of earning capacity he may have suffered or is likely to suffer in future because of the injury suffered by him;

—e—Any loss of enjoyment of life he may have suffered or is likely to suffer in future in consequence of his injuries;

—f—Any expense he may have reasonably incurred in efforts to cure or obtain relief from his injuries to the present time;

—g—Any other circumstance which has been proven to your satisfaction by the evidence which, in your judgment, adds to the damages suffered by him in consequence of his injuries.

Wherefore Petitioner asks for a new trial herein.

M. G. HENRY,
Plaintiff and Petitioner.

ANTHONY M. ARNTSON and T. W. HAMMOND
Attorneys for Plaintiff.

STATE OF WASHINGTON } SS.
County of Pierce.

M. G. Henry being first duly sworn, on oath deposes and says: That he is the plaintiff and petitioner in the above entitled action; that he has read the foregoing petition for new trial and knows the contents thereof and that he believes the same to be true.

M. G. HENRY.

Subscribed and sworn to before me this 29th day of December, 1913.

ANTHONY M. ARNTSON.

(Seal) Notary Public in and for the State of Washington, residing at Tacoma.

"FILED IN THE
U. S. DISTRICT COURT
Western District of Washington
DEC 29 1913
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

Stipulation

It is hereby stipulated and agreed by and between the parties to the above cause that the hearing of the petition of plaintiff for a new trial therein may be continued until Monday, January 19, 1914.

Dated January 6, 1914.

J. A. SHACKLEFORD.
F. D. OAKLEY.
Attorney for Defendant.

A. M. ARNTSON and
T. W. HAMMOND,
Attorneys for Plaintiff.

(Endorsed) :—

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington
Southern Division
JAN 6 1914
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,
Plaintiff,
vs.
TACOMA RAILWAY & POWER COMPANY, (a corporation),
Defendant.
No. 1262

Order

This cause came on regularly to be heard on Monday, the 19th day of January, 1914, upon plaintiff's motion for a new trial heretofore filed herein, plaintiff being represented by his attorneys, Messrs. Arntson & Hammond, and the defendant being represented by J. A. Shackleford and F. D. Oakley, its attorneys, and the cause having been fully argued, and the court being fully advised in the premises,

IT IS THEREFORE ORDERED, that plaintiff's motion for a new trial herein be and the same hereby is denied and overruled.

Done in open court this 21st day of January, 1914.

EDWARD E. CUSHMAN.
Judge.

"FILED IN THE
U. S. DISTRICT COURT
Western District of Washington,
Southern Division.
JAN 21 1914
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,
Plaintiff,
vs.
TACOMA RAILWAY & POWER COMPANY, (a corporation),
Defendant.
No. 1262

Bill of Exceptions

BE IT REMEMBERED that, on October 28, 1913, at a term of said court held at Tacoma, in said district, before Hon. E. E. CUSHMAN, District Judge, the issues joined by the pleadings in the above cause came on to be tried before said judge and a jury, the plaintiff being represented by his attorneys, Anthony M. Arntson, Esq., and T. W. Hammond, Esq., and the defendant by F. D. Oakley, Esq., whereupon the following proceedings were had, to-wit:

M. G. HENRY, the plaintiff, called in his own behalf, testified, among other things, as follows:

He had resided in Tacoma since September 14, 1911. Prior to that, since 1901, he had resided at Seattle. On April 6, 1911, he was in Tacoma buying bonds for his employers, Carstens & Earles of Seattle, and had occasion to take a street car, and waited on Pacific Avenue near the Rhein Hotel for one he saw approaching. He was accompanied part way toward the car by a young man with whom he had been talking at the office of an acquaintance. The car came and stopped to let on a number of passengers who were waiting for it. The entrance to the car was "amidships." He stepped to the rear of the entrance and stepped aside to permit a couple of ladies to precede him. As the last of them stepped up, he grasped the handhold of the car with his left hand, put one foot upon the step, reached with his right hand for the other handhold and had secured a light hold, when, without warning, the car started. He was jerked off his feet, felt himself going, thought he was going under the rear tracks of the car, and that was the last he knows of what happened. He had a very faint recollection of going back to the Donnelly Hotel, where he stopped when at Tacoma, and of feeling used up. There, with assistance, he went to the toilet, and vomitted blood. He was sent from there to a steamer and went home. He felt very sick and dazed, and remembers vomitting more blood on the boat. the following day, he consulted Dr. Gardiner, of Seattle.

The result of the accident was a rupture of his stomach and an injury to his head. He continued his work with Carstens & Earles with difficulty. He had been engaged in various occupations until he was employed by Carstens & Earles, who were engaged in the investment banking business. Before the accident, he had studied along financial lines, was rapidly building himself up and had thoroughly mastered the business in which his employers were engaged. His work with them was, primarily, the purchase of bonds, a business requiring judgment and a knowledge of securities. Prior to the accident, for several years, his health had been perfect, his recreations being canoeing, boating, hunting, fishing, and other out of door pleasures. At the time of the accident, he was drawing a salary of $100 per month. After the accident, he was a physical wreck. He tried to do his work, and hung on until about the middle of August, 1911, when he was discharged. At that time, he had a launch on a lake, and, once, because of his inability to use his legs, fell from it into the lake. He had a motor cycle, but was obliged to give up using it. It was a matter of frequent occurrence, while walking along the streets in Tacoma, and elsewhere, for people to insist on helping him. For a long time he had been in such condition, that he avoided crowds. He bumped into people. Once, at Raymond, he was walking on a sidewalk ten feet wide, and, through his legs not working together, nearly went into the mud and

ooze where the tide ran in and out. At another time, while at Raymond, from the same cause, he fell and was helped up. He tries to walk straight, but frequently bumps into people. He dreaded to walk on the streets. Women and children were afraid of him, and got out of his way, even into the street, daily. At other times, he would slide or shoot over toward people, who did not know his condition, and they would hit him, stick out their elbows and give him a dig in the side, or whatever part of his body they happened to touch. "Several times, miserable whelps have actually struck me—hit me hard —(interrupted).

MR. OAKLEY: I think this has gone a sufficient or too great a length.

MR. ARNSTON: It seems to me it is material matter—that this jury should know this man cannot control—(interrupted).

THE COURT: Objection sustained. It cannot be said that anyone striking a person who showed evidence of affliction was the proximate result of the injury. Any one who would do the like of that would be mean enough to strike a woman or strike anybody.

MR. HAMMOND: We desire an exception.

THE COURT: Exception allowed.

MR. ARNTSON: These matters, it appears to me, would have a bearing upon the nature of the damages, as showing the mental suffering which the man has had to experience by reason of the humiliation resulting from his condition.

THE COURT: You are showing here the cause of the fault that he charged the street car company with. If you are right, the street car company is not necessarily the only institution in the world at fault; and, if somebody else has been guilty of a fault, like striking a man for some reason, that is not anything that the street car company is answerable for.

MR. HAMMOND: Of course, plaintiff would not be entitled to recover damages because of an injury received from a stroke. But, assuming that the company is liable, it must have known what would be the natural consequences of such an injury as he suffered. It would know that this man, in endeavoring to get around the streets, would necessarily become an object of aversion, perhaps, or anger, or something of that kind. It would be the natural consequence of the condition which followed the injury. If it be true that he has been interfered with in this way, and humiliated upon the streets, or even struck, it seems to me it would be proper matter to go before the jury to show the actual injury he has suffered because of the original injury. It is proper, it seems to me, for us to place before the jury and before the court all the circumstances which have resulted from the injury, and which might add to his mental distress, or even pain, upon the question of what would be proper compensation for the injury. At any rate, it is a question which should be submitted to the jury, to determine whether or not it was what anyone would

naturally expect from such an injury. If I go travelling around the street and bumpt myself against people because of an injury which has been inflicted upon me by the negligence of some other person, it is a circumstance which would naturally tend to embarrass me and add to my mental distress—and mental distress is an element of damage proper to be shown.

THE COURT: Objection sustained. I think it is too problematical, if the man has been struck, whether that is the cause.

MR. HAMMOND: We desire an exception.

THE COURT: Exception allowed.

MR. ARNTSON: As I understand the court's ruling, it would be proper for Mr. Henry to proceed with other matters showing the conditions and humiliations which he has suffered.

THE COURT: Yes, if it is directly traceable to the injury.

THE WITNESS then continued:

In walking up or down hills, I have the utmost difficulty. Once, on 11th Street, through the refusal of my legs to work together, I was helpless and fell. At different times, in stepping off the curb, from the same cause, I have fallen. On two occasions, through my inability to control my gait, I have shot sideways toward a dog, and he bit me. I frequently have trouble with dogs. They frequently run away, but sometimes snap at me. I have difficulty in physical work. I sometimes use all my will power to do the trivial things. Owing to the difficulty of

handling myself on the street cars, I have an automobile. All the time, I have more or less difficulty in handling it. There are times when I want to turn out, and my muscles will not respond. Once on a wide road where three machines could easily have passed, through my inability to control my muscles, I got off on the side of a hill. I have difficulties all the time. I will think I want to stop in one place and will stop to the contrary. There are times when I want to go forward, but will go backward. I will raise my foot to put it on a curb or step, and either do not raise it high enough or raise it away too much. I have trouble putting on my coat. I will reach for something, and either cannot grasp or cannot hold it. I drop things. If I go into a crowd, I am helpless. My sense of balance is affected. It is not dizziness; but an inability to control my muscles. It is impossible for me to run. The moment I try to hurry, I am helpless. I am absolutely unable to do my physical work. I use an automobile with difficulty because I have to. I have trouble starting it, and am constantly helped. Frequently, I cannot start it at all. It is necessary, in connection with my business, for me to go to outside towns occasionally. In Elma, last year, boys tried to stop me and made sport of me. They thought I was drunk. At another time, in Anacortes, the night marshal saw me and thought I was drunk. He took me by the arm and took me to the hotel, and would not leave me until assured I was a guest there. In Tacoma, the police officers

at different times thought I was drunk, and stopped me. I felt humiliated, and was obliged to request the police department to let me alone. In Chehalis one evening, the proprietor of a picture show refused me admission. I was walking with great difficulty and ran against him and he would not permit me to go in. I had a slight uncertainty in my walk, in fact, a marked uncertainty, directly following the accident. For a long time I had a falling sensation, as if falling backwards. I had a great deal of difficulty in walking, and gradually it grew worse until I reached my present condition. I never had any such trouble before the accident. Something happened to my stomach, my head and spine. I was injured in my legs, my arms and back. My hearing was affected. I have difficulty in placing sound. When I lie down, I have the most horrible feeling, as if I were falling. The accident has resulted in a nervous condition manifested in various ways. Many nights I lie awake all night suffering —not pain. I cannot describe it. It has resulted in great difficulty to do business. While I try hard to work, the amount is nominal. I am in the investment banking business—Henry - Pratt & Co. Our office is in Tacoma. Following the rupture of my stomach, I suffered excruitating pain for weeks. Finally that disappeared, and I have suffered no pain since. I have spent approximately $1200 for medical treatment by reason of the injury.

Cross-examined by MR. OAKLEY, he testified:

I came to Washington in the fall of 1901. I was

employed first by the Seattle Hardware Company for a year. I then worked a year for the Merchants Association. Then I went for several months to juneau, reorganizing the Jorgenson Co.—hardware, lumber and fishing supplies. I went back to Seattle that summer and went to buying and selling real estate until fall. I then became interested in the Hogdahl Company, house furnishing. It failed and I went to work for Carstens & Earles in Seattle, investment bankers, dealing in bonds and mortgages —buying and selling bonds and mortgages. The bulk of the business was buying and selling special or district municipal bonds. It was my third year with them, I believe, when the accident occurred. I quit working for them in the middle of August, 1911. After that, for awhile, under advice of my physician, I did nothing but stay out doors. Mr. Pratt and I opened the company of Henry-Pratt & Company, in this city in September. He was in the bond business before I was associated with him. It was agoing concern—H. P. Pratt & Co. Prior to that time, I had had a great deal of experience in buying bonds in Tacoma, and was familiar with the situation. The business of our firm is primarily investment banking, bonds and mortgages. The accident occurred on or about April 6, 1911. The man upon whom I called just before the accident was Frederick K. Beebe, a dealer in coffee. I have talked with him once or twice since. When I went into his office, I talked with a stenographer or accountant—quite a young gentleman. I believe his

name is Fred Hall. I believe the Rhein Hotel is on the corner. Mr. Beebe's place might be possibly fifty feet from it. When the time came for me to go, the young gentleman and I were talking. He came out with me. There was no car in sight. When it hove in sight, I walked down where it would stop with the other passengers. My recollection is, he walked out on the sidewalk with me. The car was then perhaps half a block away—on the south side, coming down the hill. I saw it some distance up and walked out and was waiting for it when it came. It was one of the side entrance cars. When the car stopped to take on passengers, I walked back possibly five feet. Mr. Hall walked a few feet with me, and I left him and went out to the car. There were a number of people, and my recollection is there were two ladies; there were also some men. I stepped back a little for the ladies, as one would do, and as they went up the steps I follows. As they went up the steps, I was preparing to follow them. I had nothing in my hands. The car stood there. (indicating). This would be the rear handle of the car (indicating). I put my hand on that and reached with this hand (indicating) to grasp this one handle; put my foot on the step, and I was just in a position, swinging —putting my weight on—just starting to swing myself, when the car started. I had an ordinary hold. I grasped the handle with my left hand first, and then with my foot and right hand—I reached like that (indicating), and had my right hand on

the handle, and just started to pull myself up, and the car started. I did not do anything when the car started. I felt myself going, and that is all. I cannot tell you, except the impression that flitted through my mind. I felt myself being jerked. I swung back. I had hold with my left hand—I had hold with both hands, but a firmer grasp with the left. Unconsciously, I held on, and was dragged. My right hand let go. The weight was on my foot and then it fell off the step. This was the car (indicating), and here is the handhold. I hung on with my left hand and swung around on back like this (illustrating), clear around. My legs dragged on the ground. Whatever happened I tore my coat and the left knee of my trousers. I could not say how far I was dragged. I was dazed—I do not know what happened then. I could not tell you how I got on the car. I remember having signed the complaint. It is dated November 26, 1912.

MR. OAKLEY: I want to read this to you and see whether the facts stated here are as you recollect them at this time—just at this point here in the third paragraph—"That as the plaintiff was so entering said car, climbing upward on the steps thereof, with one hand grasping a hand-hold thereon?"

A. Yes, sir.

MR. OAKLEY: "said car was, by and through the carelessness, negligence and incompetency of the defendant's servants and employes, knowingly and negligently intrusted by said defendants with

the operation thereof, started forward with a sudden jerk, without any warning to the plaintiff, whose position as above described was then known to the defendant's said servants and employes, or would have been known to them had they exercised due care in the operation of said car". Before we go any further than that, which is correct, this complaint or the testimony you have given?

MR. ARNTSON: I object on the ground that it is irrelevant and immaterial. If any slight variation should occur between the complaint and the testimony, it would probably be subject to amendment; but so far as putting the witness to the test as to the exact wording of the complaint, which was drafted by his attorney, and his testimony on the stand, it seems to me would be unfair.

THE COURT: Objection over-ruled, and exception allowed. "Q. I will call your attention to the next part of this, that the starting forward of said car as aforesaid was wholly unexpected by the plaintiff and caused him to lose his balance and footing and swung him around and off his feet. "A. Yes, swung him down from the steps as it necessarily would.

MR. OAKLEY (Reading), "And struck his head and body violently against the side of the car with such force as temporarily to deprive him of his control of his faculties. * * * that in the instant, before the plaintiff was able to realize his predicament or to release his hold of said hand-hold, or to take any action for his own protection, his

body was by the continued forward motion of said car, swung inward toward the rear trucks of said car, close to the track rail." Is that right?

A. Undoubtedly.

Q. (Reading) "And that in order to avoid great injury it became necessary for the plaintiff to retain his hold on said hand-hold and to drag himself back upon the steps of the car", is that right?

Q. (Reading) "And that such course appeared to the plaintiff to be necessary to avoid the impending danger * * * *"

WITNESS: Both are correct. I had a firm hold with the left hand. My weight was on my left foot, and I had hold with the right hand, but not firmly. I remember pulling myself up. My recollection is not different from what it was when I signed the complaint. The starting of the car swung me down from the steps and dazed me. Before I was able to realize my predicament, or to release my handhold, or take any action for my protection, undoubtedly, my body was by the continued motion of the car swung inward toward the rear trucks of the car; and, in order to avoid great injury it became necessary for me to retain my hold and drag myself back upon the steps of the car. The dragging of myself back was all an unconscious action on my part. Undoubtedly, after having been dragged some distance, dazed and unconscious, I pulled myself back upon the car. I have done greater feats of strength than that. I felt myself being jerked and thought I was going

under the rear trucks. I was not deprived of my faculties as I was being jerked; but, after I was jerked, I do not know.

MR. OAKLEY: How do you reconcile this I just read to you, where you state that the car started forward wholly unexpected to you, and you lost your balance and footing, and "swung around off his feet, and struck his head and body violently against the side of the car, with such force as to temporarily deprive him of the control of his faculties?"

MR. ARNTSON: I object on the same ground as before—irrelevant and immaterial.

THE COURT: Objection over-ruled. Exception allowed.

WITNESS: The car started and swung me around, and my head struck some part of the car. I cannot say what place or how.

Q. Now you have a pretty distinct recollection of everything that happened for one who was deprived of his faculties. I want to read this further.

MR. OAKLEY: Here is paragraph five of the complaint: "That the plaintiff, in a dazed condition resulting from said blow and the shock of said accident, and in the face of the imminent danger, aforesaid, retained his hold upon said hand-hold, and attempted to regain his footing on the steps of said car, in an effort to save himself from further injury; and, after struggling for several seconds, did succeed in regaining said steps and, climbing them, entered said car?" Is that how it happened?

WITNESS: Yes, sir.

MR. ARNTSON: It is understood, I am objecting to all of this testimony.

THE COURT: Yes,—over-ruled and exception allowed.

MR. OAKLEY: The sixth paragraph: "That from the time said car so started forward until the plaintiff regained said steps, as aforesaid, said car, by the carelessness and negligence of the defendant's said servants and employees, continued its forward movement, with ever increasing speed, dragging the plaintiff along the rough pavement and making it impossible for him to gain a footing upon the pavement; that during all of said period the plaintiff's situation as above described, was well known, or by the exercise of reasonable care, caution or diligence would have been known, to the said servants and employees of the defendant, and that by the exercise of reasonable diligence and care the said servants and employees of the defendant could, during said period, have stopped said car, and thus have enabled the plaintiff to release his hold and drop to the pavement without danger of being run over by said wheels or trucks." The conductor was standing—that is about the way this happened in your mind—the way you were dragged along there?

WITNESS: As it happened in my mind? As it did happen. I could not say whether the conductor or anyone else stopped the car. I cannot say what happened after my body struck the car.

MR. OAKLEY: Why did you undertake to come

into court and swear to a proposition of this kind? What explanation have you to make?

WITNESS: That is established on the evidence that we have. It is based on the evidence that we will produce.

I have talked to the conductor who was on the car, and he stated that he did not see me. He was two-thirds of the way back in the car—Mr. Mathieson. There were two conductors on the car. I do not know what I said to Mr. Mathieson. When I went back to the hotel, I vomitted blood. I had a hemorrhage from the ear while in the car. I had hemorrhages from the stomach from gastric ulcers, in 1907, but recovered from them fully. Never had a hemmorhage from the lungs, nor tuberculosis. There has never been any tuberculosis in my family so far as I know. I had purchased the automobile in January, 1912. That was a four passenger car. The one I have now is a little larger. I bought it early in 1913. I have driven it up the mountain from Tacoma several times. Drove it as far as the glacier this summer. That is not one of the most dangerous roads in the state by any means. If persons drive carefully, there is no danger. I have been up that road possibly eight or nine times. I took a couple of clients up there last month—went up Saturday and came back Sunday. (At this point a letter, signed by plaintiff and addressed to defendant, was offered and received in evidence, marked "Defendant's Exhibit B."):

MR. OAKLEY: This letter, Mr. Henry, is

written upon the letter head of Carstens & Earles, Investment Banker, Seattle, (reading): "Superintendent Bean, Tacoma Railway & Power Co., Tacoma, Wn. Dear Sir: Permit me to utter a vigorous protest against the carelessness of your employees in the matter of starting a car before a passenger is fully aboard. Last Thursday, the 6th inst., the writer was entering car 115 which was in charge of conductor 259"—Where did you get those numbers?

WITNESS: Somebody wrote a note and put it in my pocket, which I afterwards discovered when I got home. That note has disappeared. I am not certain as to whether it was signed. Shortly after I wrote this letter, it was taken away. I put the memorandum in my desk, and, when later I wanted it, it was gone. It had on it those items (indicating), and, whoever placed it there, had taken the trouble to get several names. He wrote those names there.

MR. OAKLEY (Reading), "Last Thursday, the 6th inst., the writer was entering car No. 115, which was in charge of conductor No. 259, and with one hand grasped the rail or door in the act of entering, when without warning the car started, as a result I was nearly thrown under the car and was much bruised and suffered severely a strain in the arm and back, besides the shock which unnerved me. I voiced my protest to the conductor in the presence of witnesses . . ."

Q. You do not explain that,—if you did not know what was done there.

A. Whoever gave me the note noticed I was in a dazed condition, and wrote a brief statement of the matter and I took my information from that. I have no distinct recollection of what I did.

Q. Well, how do you know that you voiced your protest to the conductor in the presence of witnesses? You have not explained that yet.

A. That statement there had the names of different people written on it . . . Yes, this note that I am mentioning had a statement and had the names of the people. . . I sent Mr. Arntson a copy of the letter. I thot I was going to die and I wanted him to have it in case I did die.

ANDREW HARRIS, a witness called on behalf of plaintiff, testified, among other things, as follows:

Direct examination by Mr. Arntson:

He had known plaintiff a number of years. Was clerk at the Donnelly Hotel at the time of the accident. About noon time, on April 6, 1911, plaintiff came into the hotel in a very dazed condition. There was blood all over him and his clothes were "mussed up." He asked plaintiff if he could assist him; and took him into the toilet and left him there vomitting blood. Later he put plaintiff on the bus to go to the Seattle steamer. Had seen plaintiff twice since. Plaintiff was a wreck from his former self. When he came to the hotel blood was oozing from one of his ears.

M. D. PEARSALL, a witness called on behalf of plaintiff, testified—

On direct examination by Mr. Arntson:

Had known plaintiff since the fall of 1909, and had seen him nearly every day from that time to the time of the accident. Prior to the accident plaintiff's condition and health were good. He should judge it was some weeks after the accident before he saw him. Then, he was walking with a cane and not very well. Noticed that his legs were not good, and he looked bad. He saw plaintiff frequently after that until he came to Tacoma to live, in the fall of 1911; and noticed that he grew worse all the time. Had seen him several times since he left Seattle, and plaintiff seemed to be growing worse all the while in his walk and movements.

On cross-examination by MR. OAKLEY:

Plaintiff was a customer of his at his store; and they used to go out together in plaintiff's launch nearly every Sunday.

WILL KOPTA, a witness called on behalf of plaintiff, testified—

On direct examination by Mr. Arntson:

Had known plaintiff about four years. Lived next door to him in Seattle and saw him nearly every day. Prior to the accident, plaintiff was working around his house and seemed in good shape. Some weeks after the accident, he saw plaintiff, who then looked like a sick man. Plaintiff looked pale and did not walk well. After that, while plaintiff remained at Seattle, he noticed that

plaintiff was getting feeble, would walk slow, and "seemed to need all the sidewalk."

On cross-examination by MR. OAKLEY:

He did not know how long plaintiff was confined to his house after the accident. He did not see him for several weeks, and then noticed his walk. Plaintiff then walked "kind of tottery," not nearly as bad as he does now.

OWEN A. ROWE, a witness called on behalf of plaintiff, testified as follows:

On direct examination by MR. ARNTSON:

He is in the business of real estate and mortgage loans. Had known plaintiff six or seven years—the last four, intimately. Knew plaintiff while he worked for Carstens & Earles. Was at that time in charge of the mortgage department of that firm. At that time, plaintiff was the bond buyer for the same firm—going to different towns, meeting contractors and bargaining for improvement bonds, and so on. He was acquainted with the ability of plaintiff in that line of business. At that time, plaintiff's health appeared good. Sometime in April, 1911, a great change came over plaintiff. Up to that time, he had been very active contracting for bonds in Seattle and other cities; then he seemed to run down all at once. He did not seem to be the same man at all. Up to that time, plaintiff seemed to be "well on the job," all the time, from early morning to late at night; but, after this change, he used often to go home during the day—sometimes during the middle of the day. He was

not in the office half as much of the time as he had been before. Plaintiff had formerly been very active in walking; after the change he seemed unable to control his legs, and kept getting worse in that respect. Plaintiff remained with Carstens & Earles until August or early September, possibly. He understood that plaintiff left the firm of his own accord. He had more or less experience with bond buyers; and thought he knew the qualities which go to make up a good bond man.

MR. ARNTSON: Will you state whether, in your opinion, prior to this accident, Mr. Henry was a good bond buyer?

MR. OAKLEY: I object to that as calling for an opinion which is a conclusion.

MR. ARNTSON: The witness has qualified as an expert and that he is qualified to give an opinion as to Mr. Henry's ability in this regard.

THE COURT: Objection sustained. There may be instances when such evidence is competent, but it occurs to the court that there are three or four ways to arrive at this—the wages he drew, and the length of his experience, and other ways of establishing this matter, without undertaking to make it the subject of expert opinion evidence. Exception allowed.

WITNESS: Continuing:

The plaintiff's experience in the buying and selling of bonds while with Carstens & Earles was very extensive.

Q. State, if you know, what success he made in dealings with bonds?

MR. OAKLEY: I object to that on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained. Any answer he would give would be too indefinite. Exception allowed.

MR. ARNTSON: We offer to prove by this witness that Mr. Henry was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars.

MR. OAKLEY: The complaint said that he was earning $100 a month in that business. There is no claim that he has lost a dollar by reason of being unable to perform that business. In fact, he is making more money today, or they would have shown it.

Mr. Arntson called the Court's attentions to the allegations of the complaint.

THE COURT: Objection sustained. You ask a man if he was a very successful bond buyer. That might mean one thing to one man and something entirely different to another. It is too uncertain, indefinite, general, and misleading. Exception allowed.

M. G. HENRY, the plaintiff being recalled for redirect examination, testified as follows:

Examined by MR. ARNTSON:

None of his immediate family had suffered or

died from tuberculosis. He was discharged from his employment by Carstens & Earles, went home and had to lay off. He had "gone the limit." He had a boat and spent practically all his time for a month on a lake, under the advice of his physician. When he signed his complaint, he believed it to be true.

Q. I will ask you whether or not it is true that part of the matter necessarily put into that paper was obtained from others than yourself?

A. Yes, sir.

MR. OAKLEY: I object to the question. It is leading and argumentative.

THE COURT: Objection sustained. He has already explained on cross-examination that a part of it was so obtained. Your question adds nothing to it and it is leading. Exception allowed.

MRS. M. G. HENRY, wife of plaintiff, was called as a witness on his behalf, testified, among other things:

Examined by MR. ARNTSON:

Had been married about 14 years. At Seattle, plaintiff was with the Seattle Hardware Company, the Merchants Association, and worked for Carstens & Earles; and was with the latter firm at the time of the accident. His health was excellent until the accident. He recovered fully from the gastric ulcers he had in 1907. On the day of the accident, when plaintiff reached home, she saw there was something wrong. He did not act as usual. Plaintiff did not eat his dinner and went to the bathroom

where she followed him, and found him working at his ear with his handkerchief. He was wiping off his ear. One of his arms appeared to have been hurt.

Q. What, if anything, did he say to you was the cause of his condition?

MR. OAKLEY: I object to the question as calling for a conversation, hearsay evidence.

MR. ARNTSON: I submit, under the circumstances, this is near enough to the time of the accident to constitute part of the res gestal.

THE COURT: Objection sustained. Exception allowed. This was in Seattle, was it not?

MR. ARNTSON: It was in Seattle on the same day, the man being in a dazed condition.

WITNESS, continuing—

He acted dazed, and she knew he was sick. He vomitted blood. From that time on, he could not retain his food, and she insisted that he go to a doctor. He went, she thought, the next day. After that he grew worse, at times vomitting blood; and he began to walk unsteadily. Plaintiff tried to go on with his work, but grew worse, and could only work part of the day. She noticed his difficulty about walking shortly after the accident. She first noticed a staggering and difficulty in placing his feet. He grew nervous, had trouble picking things up, and dropped things. The stomach trouble continued during that summer. His movements have grown gradually worse until he has reached his present condition. They moved to Tacoma in Jan-

uary, 1912. She has walked with him on the streets in Tacoma. She was in fear that he would fall and be hurt. She had many times heard people on the street say he was drunk, and laugh at him. He had been humiliated by persons making fun of his tottering gait, and saying he was drunk. Ladies noticed his gait, some expressing sympathy, and others derision. She had ridden with plaintiff in his automobile. He was a slow and careful driver, but she did not feel safe in the machine with him. Once while they were driving, the machine turned over. It did the same thing on one other occasion. At times, it had been impossible for plaintiff to sleep. She thought he had not had a thoroughly restful night since the accident. He could not move about the house without a cane. She noticed no difference in his movements about the house in the day or night time. He can move about in the dark as well as in the day. Prior to the accident, plaintiff's recreations were hunting, boating and fishing. Since the accident he has been unable to indulge in those things.

Cross-examined by MR. OAKLEY:

At the time the auto turned over on its side, they were going slow and were not "spilled" out. There were other people in the car, and they climbed out and waited until some other people pulled the car up again. That was the experience both times. That was last spring. They had passed people while driving on the mountain road. She did not remember whether plaintiff went to work the day following

the accident. He was not confined to the house every day. His condition gradually grew worse. She thought he worked during the first week.

Re-direct examination by MR. ARNTSON:

The next day after the accident, she noticed that plaintiff's coat and trousers were torn.

PHILIP S. MURRAY, a witness called for plaintiff, testified, among other things:

Examined by Mr. ARNTSON:

Had known plaintiff about three months, went with him to Raymond on a business trip. Plaintiff had trouble getting around. Once, at South Bend, he was obliged to grab plaintiff to keep him from "skidding" off the sidewalk. Plaintiff seemed to be able to handle the automobile all right. Once in a while he would make a little jump off the road.

Cross-examined by MR. OAKLEY:

That was about the middle of September, 1913.

JAMES PAINE, a witness called for plaintiff, testified, among other things:

Examined by MR. ARNTSON:

Is a contractor for improvement, street grading, water mains, etc. Had known plaintiff about 7 years, and done business with him, selling bonds, ever since he was working for Carstens & Earles. From the time he knew plaintiff, he seemed in good condition. Then, for sometime he did not see him. Finally, one day he saw plaintiff, and hardly recognized him. He seemed nervous, and dragged his feet—that was a month or two after the accident. Had seen him nearly every day since. Once he

saw plaintiff on the street, and people were laughing at him. He thought plaintiff growing worse.

Cross-examined by MR. OAKLEY:

Plaintiff has none of the bonds of the witness now. He had dealt with plaintiff a great deal.

C. E. KEAGY, a witness called for plaintiff, testified, among other things,

Examined by MR. ARNTSON:

Had known plaintiff about two years. Ever since he had known him, plaintiff staggered and was not able to get around very well. Last summer, he made a trip with plaintiff in his auto to Longmire Springs. On that trip, he was asked in plaintiff's presence if plaintiff was drunk.

Cross-examined by MR. OAKLEY:

He took the trip to the mountain on June 27, 1913. His wife, plaintiff's wife, and their children were along. They left Tacoma at noon and got to the inn at 6:20, about 65 miles. They went around the mountain road. It was not a dangerous road. Had been up there six times this summer, always as a passenger in a private car. He did not consider the road dangerous; but any road is dangerous with a reckless driver. In one place, there was a sheer drop of several hundred feet from the edge of the road. He had heard there had been accidents on that road. He had never ridden with plaintiff any other time.

On re-direct examination by MR. ARNTSON:

He considered plaintiff a very slow driver. When

approaching another automobile, plaintiff slowed up or stopped, nearly always.

E. M. MOORE, a witness called for plaintiff, testified:

On direct examination by MR. ARNTSON:

Had known plaintiff 8 or 9 years; and never noticed anything the matter with him prior to the accident. He had met plaintiff quite often, while he was buying bonds for Carstens & Earles. He saw plaintiff after the accident at the stadium, on the same day. Plaintiff's clothes were mussed up and he was nervous. He had observed plaintiff since then, and would say he was getting into a "pretty bad fix."

Cross-examined by MR. OAKLEY:

He was doing business with plaintiff at the present time, had sold him bonds since he was in the present firm. He thought plaintiff was now in extensive business in that line. He dealt sometimes with plaintiff and sometimes with plaintiff's partners. He was at the stadium on the day of the accident, when Roosevelt spoke. He saw plaintiff at the high school at the stadium. Had no conversation with him there. Did not recall any indication on plaintiff's face of an injury. Did not remember about his overcoat. It was shortly after noon, if he remembered, somewhere around 1 or 2 o'clock. Quite a number of people had gathered in the stadium. He did not notice that plaintiff was out of his mind, or anything of that sort.

W. J. MURPHY, called for plaintiff, testified—

Examined by MR. ARNTSON:

Has known plaintiff five or six years. Before the accident, plaintiff seemed quite "spry". He was always active.

PETER MODAHL, a witness called for plaintiff, testified—

Examined by MR. ARNTSON:

Is a policeman of Tacoma. Sometime last spring, he met plaintiff on the street, staggering along. Thinking plaintiff was drunk, he stepped up to him and asked what was the matter with him; then, he found that plaintiff was not drunk. He has noticed plaintiff being subjected to indignities. Very often plaintiff gets in the way of people, and they stare at him. He had often helped plaintiff on or off elevators.

C. E. HORN, a witness called for plaintiff, testified:

Examined by MR. ARNTSON:

Has known plaintiff 7 or 8 years. Was next door neighbor to him in Seattle for about a year. Before the accident, plaintiff was a most active man, always doing something. He had never seen any one more active. Plaintiff was sick once and went east of the mountains, but when he came back he seemed as well as ever. Plaintiff used to ride a motorcycle. He went out with plaintiff on a launch sometime in the summer after the accident. Plaintiff was then not so lively and had trouble getting around in the boat. He seemed unable to do anything and had to have help that day. He

visited plaintiff since then and went to the mountain with him twice. At those times, plaintiff's condition was very bad. He did not seem to be sure of himself in the machine. Every time he had seen plaintiff, since the accident, he seemed worse. He had seen people look at plaintiff as though they thought him tipsy, and get out of his way.

H. P. PRATT, a witness called for plaintiff, testified:

Examined by MR. ARNTSON:

He is in the investment banking business, associated with plaintiff and P. B. Kauffman; and has been so engaged three years. Prior to the accident, plaintiff was an unusually energetic man, physically and mentally. Since the accident, his health has been poor. Had been associated with plaintiff in business a little over two years. Although in pretty bad physical condition, during the first months, plaintiff accomplished "quite a little work." His highest efficiency to the firm was during the first 3 or 4 months. Since that time, his efficiency had greatly diminished. At the present time, it was small. He generally works 5 or 6 hours a day now; during the first 3 or 4 months, he worked much longer. He is not able to accomplish as much in a given time as he could before. After working a few hours, he seems very much exhausted. He averages five days a week of work. The results accomplished by plaintiff are a small fraction of what he accomplished during the earlier days of his association with him. Plaintiff's greatest value

to the firm was when he was able to act as an outside man. Now, owing to his disability, plaintiff is valueless as an outside man. The business is done principally by going to the place where it is to be tranacted and effecting it by personal interview. In the course of the purchase of an issue of bonds, it is necessary to make an inspection of the land within the district covered by the bonds. At the time he entered into business with plaintiff, plaintiff had a particular grasp upon the bond business at Tacoma—a thorough familiarity with the contractor who was in the habit of having bonds to sell, with the city, with the district under improvement, and with all the details of the bond business. Plaintiff's interest in the business at the present time is between 25 and 30%.

MR. ARNTSON: Is that interest to continue?

MR. OAKLEY: I object to that on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: Objection sustained. Exception allowed.

MR. ARNTSON: Please state whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?

MR. OAKLEY: I object to that.

THE COURT: The objection will be sustained. It is speculative.

Thereupon plaintiff prayed an exception to the ruling, and the exception was allowed.

MR. ARNTSON: I offer to prove by this witness that, by reason of Mr. Henry's condition—his

inability to do business and to travel about as demanded by the business—matters have progressed to a point where they have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time, when he must sever his connection with this business. I offer to prove that as bearing upon the measure of damages as the result of his injury.

MR. OAKLEY: I wish to save an exception to the remarks of counsel just made in reference to carrying the plaintiff here as a charitable act, and discontinuance with the firm, as calculated to prejudice the jury.

THE COURT: The objection is sustained, and the jury instructed to disregard the offer. There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions, himself. Counsel must be careful, so, if you get a verdict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in one shape or another. It will be more than likely to result to your prejudice than to do you good.

Whereupon plaintiff prayed an exception to the ruling and remarks of the court, which exception was allowed.

And, thereupon the court further instructed the jury as follows:

"The remarks of the Court are in a sense provoked by the counsel. The remarks of the Court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by his offer, which he had no business to make in the form that he did—the Court felt it required some reprimand to call his attention to the fact, so that he would not repeat it. And, therefore, the remark was made."

Whereupon plaintiff prayed an exception to the instruction aforesaid, and such exception was allowed.

J. E. JONES, a witness called for plaintiff, testified:

Examined by MR. ARNTSON:

He was in the automobile business and had sold plaintiff two or three machines within a year and a half. He went once with plaintiff on a trip to Montesano; and, after they had driven 18 or 20 miles, he took the wheel away from plaintiff "because he seemed to get so bad—he did not seem to have full control". After he had driven awhile, plaintiff would not have the same control as at first. Plaintiff moved very much like a drunken man in getting in or out of the car.

P. B. KAUFFMAN, a witness called for plaintiff, testified—

Examined by MR. ARNTSON:

He is a member of the firm of Henry, Pratt & Co. of which plaintiff is a member. Had known plaintiff since he became associated with him in

October, 1911. When he first knew plaintiff, plaintiff seemed to have some hesitancy in walking; and, since then, has grown steadily worse, until it is almost impossible for him to walk at all. The actual work done by plaintiff at the present time is very small. Plaintiff comes down to the office when he is in absolutely no condition to be there, and endeavors to and does do some work. In the mornings, he does some work, but, in the afternoons he does practically nothing now. Plaintiff did a great deal more work at first. He worked early and late, in fact, more than anyone else in the office; but has steadily been doing less and less. On one occasion he took a trip with plaintiff to Yelm to examine into a proposition of some bonds issued by an irrigation company. Plaintiff started to drive the machine, but, after going a little ways, and not caring to risk his own life, the witness took the wheel and drove himself the whole day. They went over the entire property in the machine. It was necessary to use an automobile to enable plaintiff to get around at all. On several occasions he had assisted plaintiff home, when he seemed "to be played out."

DR. F. P. GARDINER, a witness called for plaintiff, testified—

Examined by MR. HAMMOND:

Had practiced medicine at Seattle since 1900; and had seen and treated affections of the brain and nervous system in a general way. First became acquainted with plaintiff at Seattle, in 1902.

In 1907, treated plaintiff for gastric ulcers, from which he recovered. On April 8, 1911, examined plaintiff, and found him bruised on the side, shoulder and arm. Plaintiff complained of pain about the head and of an uncertainty. He said he felt as though he were falling towards the side. Plaintiff told him he had been hurt, and complained of having vomitted blood, and of having been hurt in one of his ears. He kept plaintiff under observation two or three months after that. During that time, the gastric trouble ceased; but the nervous disturbance increased. Later, he felt that there was a disturbance at the base of plaintiff's brain—in the cerrebellum. In cases of injury to that organ, there is a lack of equilibrium. The gait is staggery, in a measure resembling that of a drunken man. The plaintiff did not improve under his treatment, so far as his nervous symptoms were concerned,—they were more pronounced at the end of three months. Plaintiff then left Seattle. He had seen him once or twice since. Examined plaintiff about a week ago. His walk was then decidedly worse than before. Such symptoms as he saw in plaintiff could have been produced by a blow upon the head. Vomitting may be expected to follow an injury to the head or body. If the condition in which plaintiff now is is the result of an injury, he did not think plaintiff would recover, or improve. It might not shorten plaintiff's life, except as that it might invite other troubles. Assuming that, on April 6, 1911, in attempting to board a street car,

plaintiff was suddenly swung against the side of the car and received such a blow as to cause a discharge of blood from one of his ears; that, prior to such injury he had never shown any of the symptoms you have described, and soon thereafter the symptoms began to appear, and have gradually increased until he has reached the condition in which he was at the time of his last examination, in his opinion the present condition was caused by the injury. The fact that there was a flow of blood from the ear made it probable that the skull or some portion of it was fractured at the time of the accident.

Cross-examined by MR. OAKLEY:

The only sign of a fractured skull he noticed on his first examination of plaintiff was the disturbance of equilibrium. Though not pronounced, it was noticeable at that time. The plaintiff vomitted blood while he was treating him for gastric ulcers in 1907, for three or four months, frequently. He gave plaintiff the same treatment for his gastric trouble following the accident that he had given him in 1907. The hemorrhages ceased in two or three weeks. He made no examination of the ear and did not observe any discharge from it. The usual result of a fracture severe enough to cause the flow of blood from the ear is that the man is laid out, dangerously sick, and, as a rule, he dies. He would expect paralysis to follow—an inability to either feel or move—differences in sensation. The plaintiff suffers from muscular incoordination, or inability to have his muscles work in harmony. The

same result might follow from any disease of the cerrebellum—anything that would cause hardening or pressure. He had heard of locomotor ataxia. There is incoordination in that disease, but not such as plaintiff has. In a degree these symptoms are asserted in Friederich's ataxia. By ataxia, he meant any affection of those centers that control motion. The plaintiff was evidently suffering from a disturbance of the cerrebellum. It might be caused by anything that would cause pressure there, including trauma. Heredity is scarcely worth mentioning as a cause; there is a possibility of that. Syphilis will cause ataxias. He had never noticed any peculiarity in the gait of plaintiff before the accident. At the time he examined him, in April, 1911, there was nothing in the physical condition to lead him to suspect a fracture at that time. His attention was called and his treatment directed to the gastric trouble. He recovered from that. He was led at that time to suspect that there was an injury to the brain by the noticeable disturbance of the nerve center and the statement by plaintiff of his inability to know exactly where he was. He gave plaintiff the same treatments that he had given him formerly in 1907 for gastric trouble, and the gastric ulcers disappeared and the hemorrhages ceased. When he first examined the plaintiff the bruises were slight,—no skin was knocked off and discoloration was not decided, but noticeable. It was not real black, but partially so. It seemed to

have been a trivial affair and I went on and treated him for the old gastric trouble.

Re-direct Examination by MR. HAMMOND:

The plaintiff had been well for two years prior to the accident. The old scars from the gastric ulcers may have been torn apart by the injury. The cerrebellum governs and controls the muscles, causing them to act in harmony. Plaintiff's muscles do not act in harmony. In his opinion, plaintiff was not suffering from locomotor ataxia. As a rule, locomotor ataxia develops slowly. You would not be likely to notice it in two or three days or two or three weeks from the first symptoms. In locomotor ataxia there are sharp, shooting pains. He had not known plaintiff to have such pains—not particularly. In locomotor ataxia, the reflex of the pupil of the eye is absent as to light, but present as to distance. In the normal eye, the pupil contracts when suddenly exposed to light. It does not do so in locomotor ataxia. It does do so in plaintiff. The most common cause of locomotor ataxia is syphilis; there is no indication of syphilis in plaintiff. In cases of syphilis affecting the brain, the symptoms are of slow development; you would not expect them to follow a blow or injury to the head. Freiderich's disease comes on principally and generally in cases of young persons.

Re-cross examination by MR. OAKLEY:

He thought plaintiff was suffering from a disturbance to the cerrebellum. Freiderich's ataxia is a disturbance of that organ; locomotor ataxia is not.

In that disease, the spinal cord is affected.

DR. D. A. NICHOLSON, a witness called for plaintiff, testified—

Examined by MR. HAMMOND:

Had practiced medicine at Seattle since 1905; had made a special study of affections of the brain and nervous system, and confines his practice to that work. He had made two examinations of plaintiff, the first in November, 1912. At that time, he found plaintiff suffering from a disease that interfered very materially with his walking and employing himself, where the muscles were called into play. There was some unsteadiness of the arms, and a decided unsteadiness in his gait. There was some disturbance of sensation in the hands, arms and legs. About two weeks before the trial, he again examined plaintiff. At that time, he found the same trouble in walking, in standing, and in using the legs, and in using the arms. There was considerable disturbance of the sensation in the feet, legs and hands, and there were small areas over the body in which sensation was lessened or changed. It would not be as acute to cotton wool, as it ought to be, or to the prickling of a pin; and there was some disturbance of sensation when he applied heat and cold—he could not distinguish between heat and cold. There was a slight curvature of the spine in the neck, the muscles of the left side of the neck were more developed than on the right side. There was a slight wasting of the muscles of the hands. The grasp of the right hand did not seem as strong

as that of the left. It ought to be stronger in plaintiff. Assuming that, in the spring of 1911, in attempting to board a street car, the plaintiff was suddenly swung against its side, and received so violent a blow as to cause a discharge of blood from one of his ears; that, prior to such injury, he had never shown any of the symptoms he had described; that, soon thereafter, the symptoms mentioned began to appear, and have gradually increased until he has reached the condition in which he was at the time he last examined him, he, the witness, would presume that the injury would be accountable for the condition found. He would not expect any improvement in plaintiff's condition. He would not be surprised if the disease should continue to progress; he would expect nothing better than that the disease would remain stationary. The tendency of such a disease is to progress. In his judgment, plaintiff is suffering from a disease of the cerrebellum, and, possibly, of the medulla. Such a disease might follow an injury or blow. Patients sometimes recover from fractures of the skull. Hemorrhages in the cerrebellum might cause disease of that organ. He had examined plaintiff to determine whether or not he was suffering from locomotor ataxia, and found no-one of the cardinal symptoms of that disease, and, for that reason, excluded it. The most frequent cause of locomotor ataxia is syphilis. He could find no evidence of that disease in plaintiff.

Cross-examined by MR. OAKLEY:

In his opinion, plaintiff was suffering from cerrebellar ataxia. That may be produced by any disease of the cerrebellum, such as a new growth, an abscess, syphilis, tuberculosis, a disease of a blood vessel, or small hemorrhages—anything that will destroy cerrebellar tissue or brain substance. He could not tell which of these causes was most frequent. There was a form of cerrebellar ataxia which seems to be based upon inherited conditions, but that form occurs largely in children, it might occur beyond the period of 30 years. He had known cases where pernicious anemia had caused cerrebellar ataxia. He had been able to find cases in the authorities in which trauma was attributed as the direct cause of cerrebellar ataxia. He could not recall what authorities, but would cite the present case as one. He examined plaintiff's lungs and found no evidence of tuberculosis.

Re-direct examination by MR. HAMMOND:

He was satisfied that the condition of plaintiff could have been produced by a blow on the head. He had noticed no evidence of anemia in plaintiff. We do not inherit tuberculosis. He had discovered in plaintiff no symptoms of either tuberculosis or syphilis.

DR. J. W. SNOKE testified that, in April, 1912, he examined plaintiff and had examined him several times since then. In his opinion, plaintiff was suffering from cerrebellar ataxia, and that, assuming that, on April 6, 1911, in attempting to board a

street car, plaintiff was swung against its side and received so violent a blow as to cause a discharge of blood from the ear; that prior to such injury he had never shown any of the symptoms such as he now presents; and that, soon thereafter, the symptoms mentioned began to appear, and have gradually increased until he has reached the condition in which he was at the time of his last examination, his present condition was due to the injury received at the time of the accident. He had found no evidence of syphilis or tuberculosis in plaintiff. He thought plaintiff would not recover; and would expect him to become worse, and that, within a few years, he would be unable to walk at all. Freiderich's ataxia is a form of cerrebellar ataxia that usually runs in families, and develops before puberty. He would not say that cerrebellar ataxia was very seldom the result of trauma. Common causes are tumors, involving the cerrebellum, abscesses, tuberculosis, syphilis and hemorrhages.

DR. CHARLES R. McCREARY, testified that he examined plaintiff first in October, 1912, and had examined him several times since. In his opinion, plaintiff was suffering from cerrebellar ataxia, and, assuming the facts relating to the accident to be as claimed by plaintiff, the condition was due to the injury received at the time of the accident. He did not think the plaintiff would improve, but, rather, expected the time would come when he could not walk at all. He had examined plaintiff for syphilis and found no evidence of it.

DR. CHARLES JAMES testified that he had treated plaintiff more or less continually since May, 1911; had done everything he knew to do, but the patient had gradually grown worse; and, in his opinion, the time would come when plaintiff could not walk. He thought plaintiff's life would be shortened by the disease. His general debility would prevent the exercise needed to keep plaintiff in health.

ALBERT OLSON, a witness called for defendant, testified—

Examined by MR. OAKLEY:

He was the motorman on the car at the time of the accident. He was shown defendant's Exhibit A, introduced in evidence, and said it was an exact representation of the car. At the time of the accident, he was at the front end, and had no view back in the car. Defendant's Exhibit C, in evidence, is a fair representation of the car. There was a looking glass at the front end of the car so adjusted that, by looking into it, he could see the steps at the entrance to the car. It gives a view of about two feet into the street. He stopped the car and some passengers got on at the time of the accident. He got the signal to go ahead, looked in the glass, saw that everything was clear on the step, and started up. He saw nothing of the accident. He first learned that an accident had happened at the depot on the same trip. The conductor told him of it. He did not see plaintiff before the accident. The place of the accident was a regular

stopping place for the car. All cars stopped there, whether there were any passengers or not. He got no signal to stop the car after he started up. He thought the first stop was at the Union station, but could not remember.

Cross-examined by MR. ARNTSON:

The conductor's name was Mathieson. His statement that he had looked in the glass was based upon the fact that he usually did so and not upon his recollection of this particular instance.

ARTHUR S. BATSON, a witness called for defendant, testified—

Examined by MR. OAKLEY:

He was seated on the car directly opposite the entrance at the time of the accident. The car stopped. He had a clear, unobstructed view of the entrance, but saw no one enter the car. The car started on, and, very soon, he heard the remark passed that somebody had hurt his wrist, but it was said in such a jocular manner, that he did not pay much attention to it. He had a faint recollection of seeing a man board the car before it started; that the man "kind of made a slight slip," but seemed to get on the car all right afterwards, "just like he might have struck the second step in place of the first—he kind of slipped from the second step to the first and then recovered himself. He thought the car had not gone over half its length before that incident occurred. After plaintiff got on the car, he took the second seat on the east side of the car. He did not notice anything to indicate that plaintiff was in

a dazed condition; and thought plaintiff's complaint that his wrist was hurt was made in a jocular manner. He did not hear him say anything further to the conductor. He did not remember seeing any blood coming out of plaintiff's ear or running down his face; he did not see anyone take a piece of paper and write anything and place it in plaintiff's pocket. To the best of his knowledge, there was no evidence of the accident taken at the time. After the car started, there was no stop until it reached the depot and at the end of the line. The conductor was standing behind the center rail of the main entrance of the car. There was a student conductor on the car who was standing in front of the center rail. From where witness sat he could have seen a man if the man had had his left hand on the rear hand hold and was dragging alongside the car and struggling to get on to the step; and he saw nothing of that kind.

Cross-examined by MR. ARNTSON:

He could not swear as to the exact spot where the conductor stood at the time of the accident. He was not two-thirds back in the smoking department.

MARTIN MATHIESON, a witness called for defendant, testified—

Examined by MR. OAKLEY:

He was the conductor in charge of the car at the time of the accident. About 12:15 o'clock he made the regular stop at 21st Street. There were no passengers to get on there. The car stopped 5 or 10 seconds, he saw that everything was clear, and the

student conductor gave the bell to go ahead. The car had gone about half its length, when a passenger swung on. "he kind of slipped like, but, as near as I can remember, he grabbed the front handhold and kind of swung himself on. He kind of slipped back, and his side kind of struck up against the car, and he complained of hurting his wrist when he got on the car, and he said that we had started the car too quick. That is all I remember that was said." The witness was standing at the time right back of the center rail at the entrance to the car. When he first saw him, plaintiff was running alongside the car. The car had gone, he should judge, about half its length, and was moving at the rate of two and a half to three miles an hour. He did not recall any passengers getting on. When plaintiff got on, he went into the back part of the car; could not say what seat he took. Roberts (the student conductor) was collecting the fares. He did not remember that anyone was attempting to board the car at the time the signal was given to start. Plaintiff complained that they had started the car too quick; and that he had hurt his wrist. He was in position to have observed whether or not plaintiff got on the car, put his right hand on the main post running up through the center of the entrance, his left hand on the back handhold, and the car started suddenly with a jerk and threw his hand off this center rail, and threw him, and dragged him several feet along the street, before he succeeded in struggling on the steps of the car, and saw nothing of the

sort. The plaintiff finally entered the car through the entrance in front of the central rail. He saw no blood flowing from plaintiff's ear; nor did plaintiff's clothes look torn or dirty, that he could see. He did not see anyone write any note and put it in plaintiff's pocket. At plaintiff's request he assisted plaintiff in obtaining the names of the witnesses of the defendant, including Mr. Batson and Mr. Roberts. Plaintiff told hi mthat the corporation had no mercy on him, because they had discharged him and wanted him to testify for plaintiff, but he informed plaintiff that he would tell the truth no matter for whom he testified. He had been discharged by the defendant company for failing to collect fares; was not employed by them at any time during the trial and had no interest in the outcome of the action.

Cross-examined by MR. ARNTSON:

He would not swear that no other passengers got on at the time of the accident. He was in charge of the car. Roberts was a student conductor under him, being broken in. The plaintiff swung on to the car just before bells had been given to stop. "It happened so quick, kind of struck against the side of the car, just swung around and swung up a few seconds later." Plaintiff struck the side of the car after he got on the steps. His first act was to run along side of the car; and just as he got on to the car, he grabbed the front handhold. The side of his body struck against the "inside end" of the car. He was swung forward so as to hit that side.

Plaintiff's feet were on the first or second step when he struck against the car.

ALBERT OLSON, recalled for defendant, further testified—

Examined by MR. OAKLEY:

The car was equipped with an appliance to prevent the jerking of the car when starting. A car that had moved its length after starting would be going about three miles an hour. He did not remember whether, at the time of the accident, this car was started with a jerk. "It was started about the same as we always do."

Cross-examined by MR. HAMMOND:

He had had considerable experience on those cars, and had known them to jerk, sometimes, when they started.

DR. H. W. DEWEY, called for defendant, testified—

Examined by MR. OAKLEY:

Had examined plaintiff and believed him to be suffering from cerrebellar ataxia. The general causes of that disease are blood conditions and diseases of the arteries which cause hemorrhages, breaking down of the arteries and the lodging of the blood in that part of the brain, a blood taint causing growths or tumors in that part of the brain —any disease that might effect the cerrebellum. He did not think a tubercular condition would cause it; such condition usually affecting the membranes and not the brain itself. He had never heard of a case of cerrebellar ataxia being produced by

trauma or read of such a case, and could hardly see how it could be produced in that way without a fracture of the skull covernig that part of the brain. He had looked but had found no authority stating trauma was a cause of the disease. A person receiving a blow so violent as to fracture the skull and cause blood to flow from the ear would probably be unconscious and die. He had seen many and had never known one that did not die.

DR. EDWARD A. RICH, a witness called for defendant, testified—

Examined by MR. OAKLEY:

Cerrebellar ataxia is a disease of extreme severity, which occurs only where there are tumors or syphilis of the cerrebellum, and is practically unknown in other conditions. In an experience of many years, the only cases he had known were caused by tumors. The authorities, however, claim that the disease may be due also to syphilis, a chronic closue, to crushing and severe injuries, causing a destruction of the cerrebellum. There is a transient cerrebellar ataxia due to hemorrhage. A vessel in the cerrebellum may break, and blood flowing out might cause ataxia for a little while; but as quickly as the blood absorbed, the symptoms would pass away. He had never known a case where a blow fracturing the base of the skull had caused the disease. Pernicious anaemia is stated as one cause of the disease, by the authorities. The ordinary form of cerrebella ataxia is apt to be hereditary. Fracture of the skull at its base al-

most always results in death. If not, it generally results in paralysis. Cerrebellar ataxia is more or less of a pregressive disease, becomes worse and worse, and the patient finally succumbs to some other disease.

DR. H. M. REED, a witness called for defendant, testified—

Examined by MR. OAKLEY:

Examined plaintiff on April 24, 1911, for the defendant. At that time, plaintiff would not remove his shirt, and he made the examination without. At that time, plaintiff claimed to have received bruises as the result of being dragged some distance by a street car. He complained of his stomach, and of having vomitted blood. He did not then exhibit any symptom of an injury to the brain. There was no unsteadiness in his gait. He said nothing about his ear. He said he had bruised his head, nothing to show that he had sustained an injury to his head aside from his statements. He had not seen plaintiff since then until now. The ordinary causes of diseases of the cerrebellum are sypilis, new growths, and degeneration caused by affections of the blood vessels,—any cause interferring with nutrition of the organ. Inheritance has been laid down as a cause. He would not say it was impossible for it to be caused by trauma; but it is not laid down by the authorities that that is one of the causes of cerrebellar ataxia. The organ is so protected by its position and by overlying muscles that it is not likely to be injured.

Cross-examined by MR. HAMMOND:

Unusual results sometimes come from injuries to the head. He had been testifying concerning the usual results of such injuries.

The PLAINTIFF, called in rebuttal, testified—

Examined by MR. ARNTSON:

That Mr. Mathieson, the conductor, had stated to him that the first he remembered of seeing plaintiff was when plaintiff came up into the car; and that he (Mathieson) was then back perhaps half way between the entrance and the rear of the car, talking to a man.

J. WESLEY ROBERTS, called for plaintiff in rebuttal, testified—

Examined by MR. ARNTSON:

He was on the car of defendant as a student conductor; at the time of the accident, he was standing in front of the central rail at the entrance; Mr. Mathieson, the conductor, was standing about the middle of the smoking compartment, talking to some man. The car stopped and some four or five passengers got on—ladies and gentlemen. He noticed a man among them whom he has since learned to be the plaintiff, here. A lady and gentleman got on at the front side of the central rail, and two ladies got on at the back. Plaintiff stood aside to let the ladies get on at the back; and, as the gentleman got on in front, he looked around where they stood to get their fares. The conductor said, "All Right," and witness gave the motorman the bell to go ahead, without looking around at the

steps. After he gave the bells, he noticed plaintiff reaching with his right hand to grab the iron post in the center of the entrance. Plaintiff already had hold of the rear handhold with his left hand. As the car went forward, it swung plaintiff around to the side, holding on with his left hand. The car went about ten feet before it stopped. After the car stopped, plaintiff got on. All he heard plaintiff say was that he hurt his wrist. The witness went on and collected his fares in the front part of the car and then came back to where Mathieson was talking with plaintiff. He noticed blood on the right side of plaintiff's face. When he first saw plaintiff, he was among the passengers while the car was standing still. When he next saw him, the car was in motion. Plaintiff had one foot on the step when the car started. At that time, witness was watching where the passengers were sitting so as to get their fares. Plaintiff got off at 9th street. The witness signalled for the car to stop as soon as he discovered plaintiff's position. He couldn't see plaintiff's body at that time, but could see his head and arm.

Cross-examined by MR. OAKLEY:

He was discharged from the employment of the defendant for shortage in fares. He was 17 when he went to work for defendant, in 1911, and told it he was 21 to get the job. On April 14, 1911, he signed a statement for defendant, in which he said that about 12:15 p. m., the car stopped. "One man boarded the car, and, as there was no one else to

get on, he gave the motorman the signal, and the car started. After it had gone a few feet, I noticed a gentleman standing to the right of the track and still north of the crossing, and as the car entrance passed him, he took hold of handle and boarded the moving car very nicely." The statement was not true, was not written by him, he did not know that he had ever read it, and supposed he would have signed anything at that time. He had signed defendant's "Exhibit C," which was offered and received in evidence. He had lied to defendant twice, once in stating his age, and again in signing that statement. He had, several times, during the last two weeks, said to Mrs. Norris, with whom he was boarding, that after this trial was over he and plaintiff were going to take a long trip. Plaintiff had told him something about a trip he was going to take around the world; that the doctors advised him to take. Plaintiff told him, about a year ago, that he had got his (plaintiff's) ticket for a trip around the world, and also had a lady nurse hired to go with him; but, as plaintiff got sick, or worse, it was impossible for him to go at that time. So he told the witness, he had made up his mind to go now. Plaintiff had told him that, two or three weeks before the trial. Plaintiff told him that, when the case was over, he was thinking of taking his automobile and the witness and drive from Tacoma to San Francisco, and taking the boat there. Plaintiff had asked the witness if he would like to go with him, and witness told him

he would. Plaintiff had then said he would write to the mother of the witness and ask her opinion on it. He did, and she consented. Plaintiff had said, from the time they left until they got back, the trip would last 8 or 10 months. Plaintiff was going to take his automobile on the boat. He did not know that anything was mentioned about his testimony in this case. He did not believe plaintiff ever came right out and asked him to testify for him. Plaintiff wanted to know some particulars about the case and so on. He could not tell at the present time just what plaintiff did say. He had gone automobiling with plaintiff half a dozen times; and had had the machine at his disposal; had driven it.

EDITH P. CURTIS, caled for plaintiff, testified that she was a sister of plaintiff, forty-five years of age, and had never known or heard of any member of her family being afflicted with such a disease as plaintiff was affected with; and had never heard of any member of her family, or of her ancestors, father, mother, grandfather or grandmother having cerrebellar ataxia.

MARTIN MATHIESON was recalled by plaintiff—

Examined by MR. ARNTSON:

Q. I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?

MR. OAKLEY: I object to that. It was intro-

duced simply for impeachment purposes of Roberts. It is not in rebuttal of anything introduced.

MR. HAMMOND: It is not rebuttal, but it is the first time we knew of any such thing. It is part of our cross-examination, for the purpose of showing, if we can, that this witness (Mathieson) has a direct, positive interest in the result of this case.

The COURT: Objection sustained. It is not rebuttal.

MR. HAMMOND: I don't think it is properly rebuttal; but I ask the privilege of calling the witness for further cross-examination in order to show this. This is the first time it has come to our knowledge that employes of defendant were bound in this way. It seems to me material, if we can, to show that this witness is bound, so far as the law can do it, to make good to the defendant any verdict that might be rendered in this case.

The COURT: Motion denied.

Whereupon plaintiff prayed an exception to the ruling, and such exception was allowed.

MR. HAMMOND: I will ask the same privilege as to the witness Olson, and ask leave to prove by him that he has signed a similar contract.

The COURT: Assuming that the same objection will be made?

MR. HAMMOND: Yes.

The COURT: Objection sustained, motion denied, and exception allowed.

The plaintiff requested the court to charge the

jury, among other things, as follows, to-wit:

I.

"It is admitted by the pleadings in this case that, at the time alleged, one of the defendant's cars stopped to take on passengers, and that an accident occurred; and, if you shall find from the evidence that plaintiff was at the car before it started, for the purpose of boarding it as a passenger, and that as he was about to get on, the car started and, in consequence thereof, he was injured, the defendant is liable, unless you shall believe from the evidence that the agents of the defendant in charge of the car exercised the highest degree of care and diligence to ascertain his danger and avoid the accident with the operation of the car."

II.

"The law presumes that, at the time of the accident, plaintiff was exercising all the care for his own safety that would be expected of persons of ordinary prudence in boarding the car under the circumstances disclosed, and, in the absence of evidence sufficient to satisfy you that he was not in the exercise of such care, the burden rests upon defendant to prove that its whole duty to plaintiff was performed and that the injury was unavoidable by human foresight."

IV.

"Not only was it the duty of defendant's agents to allow plaintiff a reasonable time in which to board the car, if he was present at the time it stopped or before it started for the purpose of get-

ting on, but it was their duty to see to it that the car was not started again while the plaintiff was in the act of getting on or in a place where he would be exposed to danger in case the car were to be moved. In other words, stopping the car a reasonable time to allow plaintiff to get on to it would not of itself be sufficient, but it was the duty of the conductor to see and know that the plaintiff was not either in the act of boarding the car or in a dangerous position in case the car should move before starting the car; and, if he failed in that duty, and plaintiff was injured, defendant is liable."

V.

The defendant is held to the highest degree of care, skill, and diligence for the safety of persons about to board its cars consistent with the conduct of its business. This car was under the control of the agents of defendant and they were bound to know, if by the exercise of extraordinary care, caution and diligence they could know, whether plaintiff was attempting to board its car at the time of the accident, before permitting the car to start in such manner as would be liable or likely to injure him, and if, in consequence of even slight neglect in the performance of such duty, plaintiff was hurt, defendant is liable.

VI.

Sound public policy requires that street car companies be held to the strictest diligence and care to prevent injury to persons while getting upon their car as passengers; and if you shall believe from the

evidence that, before starting this car, the conductor did not do all in his power, consistent with performance of his other duties upon it, by looking, listening, inquiring, or otherwise, to ascertain whether plaintiff was present and in the act of getting on, or was where he would be liable or likely to be hurt, and to avoid injuring him, and that, in consequence of the failure of the conductor to discharge his full duty in that respect, plaintiff received the injuries complained of by him, defendant is liable.

VII.

In boarding this car, plaintiff was bound to use only such care as an ordinarily prudent man might be expected to use under like circumstances in view of the probable danger in doing so; and, in determining whether, in this instance, he did exercise such care, you should take into account the circumstance that the conductor owed to plaintiff the highest practicable degree of care to avoid injuring him, and that plaintiff was entitled to expect the conductor to perform such duty.

XI.

If you shall believe from the evidence that, in taking hold of this car and holding to it, if he did take hold of it and hold on as he has testified, the plaintiff did not exercise all the care to be expected of an ordinarily cautious and prudent person to exercise, but, nevertheless, shall believe that the injury to him, if any, was due to a sudden movement of the car, unexpected by him, brought about by

the failure of those in charge of the car to ascertain his position and danger before putting the car in motion, and that, by the exercise of extraordinary care and diligence on the part of such persons, consistent with the operation of the car, the accident could have been avoided, the defendant is liable.

XII.

If you shall find from the evidence that the injury complained of was inflicted and was due to the failure of the conductor or other persons in charge of the car to exercise the highest diligence and care to avoid it practicable to be exercised, the defendant is liable unless you shall further find from the evidence that plaintiff failed to use the care for his own safety generally exercised by persons of ordinary caution and prudence under like circumstances in getting or attempting to get upon such a car; and, even then, if you believe from the evidence that such failure to exercise care on the part of plaintiff was merely the remote, and the want of care and diligence on the part of the agents of defendant was the direct and immediate cause of the accident, defendant is liable.

XIII.

In this class of cases, the fact that plaintiff was injured without apparent fault on his part, is sufficient to establish negligence of defendant, and to cast upon it the burden of proving that the injury could not have been avoided by human foresight; and, if you believe from the evidence, that plain-

tiff, when attempting to board this car, did what men of ordinary prudence usually do under like circumstances, and was, nevertheless, injured, unless you are further satisfied from the evidence that the agents of defendant in charge of the car did everything in their power consistent with their other duties that human foresight could suggest to ascertain the presence and situation of plaintiff, and to avoid injuring him, your verdict must be for plaintiff.

XIV.

If you shall believe from the evidence that, by reason of some disease or condition, inherited by plaintiff or otherwise acquired, he was at the time of the accident already predisposed to nervous affections or diseases such as he exhibits at this time, if he exhibits any, such fact will not of itself excuse the defendant, or render it less liable in this action. The cars of defendant are not operated for the sole use of healthy persons, but for the use of all persons without regard to their physical or hereditary weaknesses; and the defendant is chargeable with notice that persons of different bodily conditions and predispositions to disease will board their cars. It is reasonable to be expected that, in certain cases, if an injury happen to a person already predisposed to affections of diseases of nervous system, such injury may cause such affections or diseases to develop, or, if at the time of the injury such affections or disease have already developed, that the cure of them may be retarded or prevented entirely by the hurt.

XV.

If you shall find for plaintiff, and that his present condition is the natural result of his injuries, he is entitled to recover such sum as, in your judgment, under all the circumstances disclosed by the evidence, will fairly compensate him.

XVI.

In case you shall find for plaintiff, he is entitled to be made good, so far as money can do it, for any damages he may have suffered, and, in considering the sum to be awarded him, you should take into account every circumstance proven to your satisfaction by the evidence, tending to show a damage to him which you believe to be the natural and proximate result of the injuries suffered by him, including—

(a) Any pain he may have suffered or will probably be suffered by him in future resulting from the injury;

(b) Any mental distress he may have suffered or is likely to suffer in future resulting from the injury, such as a sense of humiliation or mortification caused by the acts or conduct of persons whom he has met or may meet induced by his appearance and condition arising from his injury;

(c) Any anxiety or danger he has been or may be subjected to because of the conduct of dogs induced by his appearance or acts arising from his injury.

(d) Any loss of earning capacity he may have

suffered or is likely to suffer in future because of the injury suffered by him;

(e) Any loss of enjoyment of life he may have suffered or is likely to suffer in future in consequence of his injuries;

(f) Any expenses he may have reasonably incurred in efforts to cure or obtain relief from his injuries to the present time;

(g) Any other circumstance which has been proven to your satisfaction by the evidence which, in your judgment, adds to the damages suffered by him in consequence of his injuries.

The court declined to give either of the foregoing instructions, whereupon, before the jury retired, the following occurred:

Mr. Hammond: I desire to except to the refusal of the court to give each of the instructions requested by the plaintiff.

The COURT: Exception allowed to the refusal to give each instruction requested.

The court instructed the jury as follows, to-wit:

Gentlemen of the jury: The Court will instruct you concerning the law in this case before you retire to determine upon your verdict. You will take with you to the jury room all of these Exhibits that have been admitted in evidence and also the pleadings in the case. It is your duty to resort to the pleadings to determine just what the difference is between the parties to this case, that is the reason they are sent out there with you so that if you do not thoroughly understand the issues between the

plaintiff and the defendant, you will have the pleadings there so you may settle the matter. In order that you may have the matter clearly before you while the instructions are being given, I will state to you briefly what the pleadings disclose.

The plaintiff came into Court with a complaint and charges in effect that the defendant was running a street car line here in this city carrying passengers; that on the 6th day of April, 1911, about eleven o'clock, one of its cars stopped at 21st and Pacific Avenue for the purpose of taking on passengers, and that while he, the plaintiff, who was there for the purpose of taking this car as a passenger, was in the act of getting on the car,—he describes the situation he was in in his complaint,—the car was suddenly started forward by the agents of the defendant in charge of the car, which caused his injury. He charges that he has been damaged by reason of the negligence of defendant in starting the car as quickly as it did when he was in the act of getting on, and the injuries that were caused by that negligence amount to $50,000. He testifies to certain amounts as having been incurred as doctor bills and destruction of certain personal property, and sums it all up in a prayer for $50,000.00 and asks for such other relief as the Court will deem him entitled to. You will disregard that part of his prayer. So far as you are concerned his prayer is for $50,000.00. In his complaint he also charges there was defective construction of the car. You will disregard any

allegation that the car was defectively constructed, because there was no evidence to support that allegation, and it has not been argued to you by defendant's counsel.

The defendant comes into Court with an answer and denies it was negligence, and denies its negligence caused any injury to the plaintiff, and alleges affirmatively that if plaintiff was injured at all he was injured by his own negligence in trying to get on the car after it started. The plaintiff then comes in with a reply and denies that he was at all negligent in getting on the car. You will see that it is here alleged by the plaintiff that the defendant was negligent, and an allegation by the defendant that if the plaintiff was hurt he caused it by his own negligence. That renders it necessary for the Court to advise you concerning what under the law negligence would consist of on the part of the plaintiff and the defendant. The defendant was at this time what is known in law as a carrier of passengers, a common carrier. So far as the safety of its passengers are concerned, it is bound to exercise the highest degree of care consistent with the proper operation of its cars. That is about as much as the Court can tell you concerning what its duty is. If it fails to exercise that degree of care, and the failure on its part to exercise such degree of care results in an injury to a passenger, and the passenger has not himself been negligent, the carrier would be responsible. The Court may go farther and tell you that when a street car stops at a

street to take on passengers, that it is the duty of those in charge of the car to allow it to remain there at the time the car stops in order for them to get on the car sufficiently to be in a safe position, unless they have got on before,—that is unless they got on in time that was less than was reasonable,—they might so accelerate their movements so they would not require what would ordinarily be reasonable time,—but, speaking generally, it would be the duty of those in charge of a street car to allow it to remain there stationary a reasonable time for those who were there to reach a safe place on the car. It would be the further duty of those in charge of the car to exercise due care, for them to wait such a reasonable time to ascertain that no passenger was in the act of getting on the car before they started, but, if those in charge of the car allowed it to remain a reasonable length of time for those that were there to get on the car, and when it had so remained such length of time that there was no one in the act of getting on the car, there would be no negligence or want of duty on their part, if they would start up the car even though someone was running toward the car to catch it.

The Court has used in these instructions the expression, "act of getting on the car." That does not mean someone trying to catch the car; it means someone in contact with the car, and in the actual act of climbing upon it, getting upon it. So far as the plaintiff himself is concerned, he, like the plain-

tiff in any other negligent case, cannot recover if he contributed in any way to the happening of the accident that resulted in his injury by his own negligence, that is, his own want of ordinary care. He was bound to exercise ordinary care in getting on the car and to refrain from attempting to board a moving car, which the Court instructs you would be negligence on his part, and if it contributed to his injury, he could not recover. As far as this case is concerned, the Court will instruct you that if he attempted to board the car after it started, then he cannot recover because it is negligence as a matter of law. As I told you, in defining the plaintiff's negligence which would debar his recovery,—I use the expression, "ordinary care." So far as the plaintiff is concerned, the negligence which the defendant charges against him is what is known as want of ordinary care. Ordinary care is defined as being that degree of care that a careful and prudent person would exercise under like circumstances and should be proportioned to the peril or danger reasonably to be apprehended from a want of proper prudence.

In this case you will first determine whether the plaintiff has made out his case. He must show by a fair preponderance of the evidence the truth of the allegations in his complaint, the material allegations in his complaint,—that is, he must show by a fair preponderance of the evidence that the defendant is guilty of the negligence which he describes in his complaint and that that negligence

resulted in some, at least, of the injuries that he has described in his complaint and the amount of damage that he has suffered by such injuries. As I say, you will first inquire into whether he has established those things by a fair preponderance of the evidence. If you find that he has, you would then direct your inquiry to ascertaining whether he, himself, had been guilty of negligence which contributed to his own injury. If he failed to establish by a fair preponderance of the evidence that the defendant had been guilty of the negligence he describes, or fails to show by a fair preponderance of the evidence that that negligence was the proximate cause of his injury, he cannot recover. Likewise, if it is shown by a fair preponderance of the evidence that he is guilty of negligence himself which contributed to his injury, he cannot recover.

In these instructions so far I have used the expression, "proximate cause," and, "preponderance of the evidence." Regarding the preponderance of the evidence, which I have told you plaintiff must produce to support the allegations of his complaint, the Court instructs you it means that evidence which is of such a character, so persuasive and so appeals to your reason and understanding and experience as to create and induce belief in your mind, and if there is a dispute, that evidence preponderates which is sufficiently persuasive and convincing in character to create and induce belief in your minds in spite of what has been brought out by the other side in the way of argument or evidence.

That is about all the Court can tell you about preponderance of the evidence. It has been defined as the greater weight of the evidence, but evidence cannot be weighed in exact terms as we ordinarily understand that expression.

The Court has told you that the plaintiff could not recover unless defendant's negligence was the proximate cause of his injury. The Court instructs you, as far as proximate cause is concerned and its definition, the law exacts that every person shall be responsible for all those consequences flowing naturally and directly from his voluntary acts. The law does not hold anyone responsible for those consequences which do not flow naturally and directly from his acts. You will understand that a common carrier in the situation of the defendant could not hurt a sick man with impunity, that is, they would be responsible, if, through their negligence, they injured a sick person. They would be responsible, he, himself, not being negligent, they would be responsible for his sickness. You would have understood that, I presume, without any instruction from the Court. Certain of the arguments have induced the Court to so instruct you.

If you should find for the plaintiff under the instructions I have and will give you, it will then be your duty to fix the amount of his recovery. You would only allow him such an amount as under all of the evidence and circumstances of the case would fairly compensate him for the injury he has sustained as the direct result of defendant's negli-

gence,—in place of, "injury," I should have said, "damages." In assessing this amount, if you arrive at that point in the case, you will take into consideration all that the evidence has shown concerning those injuries, what, if anything, has been shown concerning the pain he has endured, mental or physical, as the direct result of that injury, the extent, if any is shown, to which it has impaired his earning capacity and his ability to take care of himself, any medical attendance that has been required as the direct result of the injury. There has been an argument made and some testimony upon which that argument was based, concerning the likelihood of his continuing to suffer and continuing to have an impaired earning capacity and being obliged to incur future expense for medical attendance and treatment. So far as the future is concerned in those matters, a stronger evidence is required to justify you in allowing anything for the future on that account than for what has taken place in the past. Before you can allow anything for future disability or pain or expense in those matters, you must find from the evidence that it is reasonably certain that such will ensue.

A while ago, the Court instructed you regarding contributory negligence. Before that time, I instructed you about the burden of proof resting upon the plaintiff to establish the defendant's negligence and that that negligence was the proximate cause of his injury. When the defendant comes into Court and alleges that the plaintiff was guilty

of negligence, contributing to his injury, if he was injured, as far as that contributory negligence is concerned, the burden of proof, the duty of establishing that by a fair preponderance of the evidence, rests upon the defendant and it does not rest upon the plaintiff to establish by a fair preponderance of the evidence that he was in the exercise of ordinary care, that is, unless plaintiff's own testimony shows that he was not.

Concerning the amount of damages, if you reach that point in the case and you find it necessary to assess damages, the Court will instruct you that there was one argument used by counsel that was somewhat misleading. He argued to you that the plaintiff would be entitled to recover, if his earning capacity had been $100.00 a month, and his expectancy of life was twenty-six years, that you would on that alone be warranted in giving him a verdict of $31,000.00, $100.00 per month for twenty-six years. That would not be true, because you would have to think but a moment to see that the $100.00 that he would receive for his last month's work at the end of twenty-six years would not now be worth $100.00; it would not be worth $50.00. $31,000.00 at six per cent interest for twenty-six years would amount to $50,000.00 and more and you would have the $31,000.00 left. Figuring from that alone, it would be, as I say, greatly in excess of what would be warranted by that testimony alone.

I will read you certain instructions, and insofar

as they may be repetitions of what I have already told you, though you will give them due consideration, you will not come to the conclusion that because they are repetitions that the Court is trying to impress upon you one phase of the case more than another.

I instruct you that the law presumes nothing in favor of the plaintiff or of his allegations in the complaint, and the burden of proof is on him at all times to establish affirmatively by the fair preponderance of the evidence of his allegations of negligence against the defendant company. The fact that an accident may have occurred to him and that he may have sustained injury while attempting to board defendant's street car at 21st street and Pacific Avenue on or about the 6th day of April, 1911, raises no presumption of liability against the defendant company.

Plaintiff must prove by the fair preponderance of the evidence that as he was entering defendant's street car as described in his complaint said car was by and through the carelessness, negligence or incompetency of the defendant's servants and employes started forward with a sudden jerk without warning to the plaintiff, whose position as above described was then known to the defendant's servants and employes, or would have been known to them had they exercised due care in the operation of said car. And if you find from the evidence that on this point the evidence for the plaintiff and the evidence for the defendant is evenly balanced in

your minds, your verdict must be for the defendant, because the plaintiff has failed in his proof.

Before the plaintiff can recover, he must also go further and follow this proof with other proof and must likewise establish by the fair preponderance of the evidence that the injuries which he claims he suffered, are the direct and proximate result of the negligence of the defendant's mployes, as set forth in the complaint, and if the evidence on this point is in your minds evenly balanced both for the plaintiff and against the plaintiff, your verdict must be for the defendant, because the plaintiff has again failed in his proof.

The defendant charges that this accident was the result of the carelessness and negligence of the plaintiff himself, in that he heedlessly, recklessly, and carelessly attempted to board one of defendant's cars while the same was in motion; that it was contrary to the rules and orders of the defendant company for passengers to attempt to board a moving car.

I instruct you that if you find from the evidence in this case that the plaintiff undertook to board said car while the same was in motion and was injured thereby, this would be contributory negligence on his part barring a recovery. As I have before instructed you, so far as the defense is concerned, the burden of establishing it rests upon the defendant.

You are instructed that the plaintiff in this case would not be a passenger within the meaning of the

law unless you should find from the evidence that he was actually attempting to board said car exercising reasonable care and prudence on his part, before the conductor gave the signal for the car to start, or that said plaintiff had made known his intentions to board said car by signalling the motorman or conductor, or was standing in such a position as to indicate his intentions to board said car in such manner as reasonably prudent and careful persons ordinarily board street cars, under like circumstances, and that the conductor either saw or in the exercise of reasonable care should have seen his intentions so to do, before signalling for said car to start.

You are further instructed that if you believe from the evidence that at the time of the accident the plaintiff attempted to board said car while the same was in motion he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said car. The defendant company cannot be held liable for mistakes in judgment made by passengers in attempting to board moving cars.

You are instructed that if you believe from the evidence that the street car of the defendant was put in motion before plaintiff had attempted to board the same this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind.

If you find from the evidence that both the plain-

tiff and the employes of the defendant company were negligent and that this accident resulted from the joint or concurring negligence of the parties, that is, the negligence of both plaintiff and defendant, concurrently contributing to the injury, then your verdict must be for the defendant. The law does not undertake to deal with relative degrees of negligence, and even though the defendant's employes were guilty of negligence, if you also find that the plaintiff's negligence contributed to the injury, then your verdict must be for the defendant, regardless of the ratio or proportion of negligence of the respective parties. Where the plaintiff himself so far contributes to the accident by his own negligence or want of ordinary care and caution, that but for such negligence or want of ordinary care and caution, the accident would not have occurred, plaintiff cannot recover and your verdict must be for the defendant.

The burden is upon the plaintiff to show by a fair preponderance of the evidence that the injuries he complains of have resulted from the accident, not merely that they may have so resulted. You are not justified in awarding him for purely speculative injuries, that is to say, for results which may or may not happen, and you will allow the plaintiff nothing for future pain and suffering, unless you are satisfied by a fair preponderance of the evidence that future pain and suffering are reasonably certain to result from the injuries.

If you find for the plaintiff in this action, you

will confine your verdict to such an amount as will compensate him for actual loss and damage in the case. You will not allow anything by way of punishment or exemplary damages. There should not be any idea of punishing the defendant in your minds, but simply that of compensating the plaintiff for his loss, if as I said before, you should find from the evidence in the case that he is entitled to recover anything.

You are in this case as in every other case where questions of fact are submitted to the jury for their determination, the sole and exclusive judges of every question of fact in the case and the weight of the evidence and the credibility of the witnesses. In weighing the evidence and passing upon the credibility of the witnesses, you will take into consideration the demeanor of the witnesses who have appeared and testified before you, their manner in giving their testimony, whether they impress you as testifying freely, fairly, frankly and openly, just as you would expect a person to testify who was trying to tell you the whole truth, not keeping back anything, or whether on the other hand they impress you as being reluctant, hesitating, equivocating, shifting, having to be asked repeatedly questions before they divulge what they claimed to know. On the other hand, you are to take into consideration if they seem to be willing or interested in the case, volunteering testimony and statements concerning which nothing had been asked, what the law calls "swift witnesses"; you should also take into consid-

eration the position or situation in which each witness was placed and the condition in which he was as enabling him to know exactly the things about which he undertook to tell you, seeing them or hearing them or having an opportunity to learn them. It is easy to see that one witness may either by reason of the situation he is in or by reason of the condition he is in to be much better qualified and in a better position to see just how things happened than one not so situated. You will also take into consideration the interest that any witness may have in the case, either as shown by the manner in which he gave his testimony or by his relation to the case. This would apply to all of the witnesses in the case, experts and the plaintiff himself, who, together with his wife, have taken the stand and testified in his behalf. You would apply to his testimony and hers the same tests you do to the testimony of other witnesses including the interest they must feel in the result of the case. If you conclude that the defendant's servants who were in charge of the car may have had an interest by reason of their relation to this accident in the case, you should give weight to that in passing upon their credibility.

I believe it was twenty-six years that was shown by the mortality tables as being the expectancy of life of a man forty-two years old, which the plaintiff testified he was. You understand that these tables were admitted and that evidence was admitted simply as circumstances. The life insurance companies of the world have, over a series of years, col-

lected statistics regarding the length of human life and the length of a man's expectancy at different ages, and this is admitted simply as a circumstance showing that the average age of such men as were the subject of those tables, when they reached forty-two years old, might be reasonably expected to live twenty-six years more. You will take that into consideration in connection with all that the evidence has shown concerning the plaintiff in the case, if you reach that stage in your deliverations. You can understand that the appearance of the plaintiff—if he was an unusually robust, strong man, you might conclude that he would live more than twenty-six years; that if he did not have the usual health of ordinary men, you might conclude that he would live less, in spite of these tables.

The Court will submit to you two forms of verdict, one finding for the plaintiff and one finding for the defendant. If you should find for the plaintiff, —you have been in other cases and know it would be your duty to, before returning the verdict in favor of the plaintiff into Court, to fill in the amount of his recovery in the blank which the Court submits to you. When you arrive at a verdict, you will cause it to be signed by the foreman and inform the Bailiff that you have agreed and return it into Court.

Thereupon the jury retired and thereafter returned with their verdict in favor of defendant.

UNITED STATES OF AMERICA,
Western District of Washington.

Now on this 9th day of MARCH, 1914, this cause

having come on regularly before the Court upon the application of plaintiff for the settling and certifying of his proposed bill of exceptions lately filed herein, and the time for such settling and certifying of said bill of exceptions having been duly extended by orders of the Court and by the stipulations of the parties until and including this day, and the several amendments thereto proposed by defendant having been incorporated and embodied in said proposed bill of exceptions pursuant to the stipulation of the parties and order of the court on file; and said proposed bill of exceptions having been written anew and filed with the clerk pursuant to such stipulation and order; and, it appearing that said bill of exceptions as written anew as aforesaid contains so much of the evidence as is necessary for consideration of the exceptions taken by plaintiff and allowed by the court at the trial, except the certain exhibits introduced in evidence by the defendant and marked respectively Defendant's Exhibits "A", "B", "C", and "G", which exhibits are hereby made part of said bill of exceptions, and the clerk is hereby directed to attach the same thereto as part thereof.

Now, therefore, on motion of the said attorneys for plaintiff, it is further ordered that said proposed bill of exceptions as written anew and filed in the cause as the same now stands amended as aforesaid, with the exhibits aforesaid attached thereto, be and it hereby is settled as the true bill of exceptions in this cause, and that the same as so settled be now and here settled accordingly by the undersigned, the

Judge of this Court, who presided at the trial of this cause, and that said bill of exceptions, when so certified, be filed by the clerk.

EDWARD E. CUSHMAN,
Judge.

"FILED in the U. S. District Court, Western District of Washington, Southern Division, MAR 9, 1914.

FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy."

CASE NO. 1262.
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON.
HENRY
vs.
T. R. & P. CO.

DEFENDANT'S EXHIBIT "B."

CARSTENS & EARLES, Inc.
INVESTMENT BANKERS
LOWMAN BUILDING
Seattle, U. S. A.

11th. April, 1911.

"Puget Sound Electric Railway
Tacoma Railway & Power Co.
RECEIVED
APR. 12, 1911.
MANAGER'S OFFICE.
Tacoma, Wash."

Supt. Bean,
Tacoma Ry. and Power Co.,
Tacoma, Washington.

Dear Sir:

.Permit me to utter a vigorous protest against the carelessness of your employes in the matter of starting a car before a passenger is fully aboard.

Last Thursday, the 6th inst., the writer was entering car 115 which was in charge of conductor 259, and with one hand grasped the rail or bar, in the act of entering, when, without warning, the car started. As a result I was nearly thrown under the car, and was much bruised, and suffered a severed strain in the arm and back, besides the shock which unnerved me. I voiced my protest to the conductor in the presence of witnesses, but he did not care enough to make a record of the matter. He seemed to have no interest in the matter other than forgetting to collect the fare which is herewith inclosed in the form of postage.

Once before one of your cars did the same thing and I made no complaint. This time I shall endeavor to make such an impression as to preclude the possibility of a recurrence of such carelessness.

I have been loathe to act in the matter. However, I do not care to quietly submit to such physical suffering without protest, and have placed the matter in the hands of A. M. Arntson, an attorney in Tacoma.

Very truly yours,
M. G. HENRY.

"FILED in the U. S. DISTRICT COURT for the Western District of Washington, Southern Division, October 28, 1913.

FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy."

CASE NO. 1262.
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON.
M. G. HENRY,
vs.
TACOMA RAILWAY & POWER COMPANY.

DEFENDANT'S EXHIBIT "G."

THIS AGREEMENT, made this 24th day of March, 1911, between TACOMA RAILWAY & POWER COMPANY, a New Jersey Corporation, hereinafter called "Employer," party of the first part, and J. W. Roberts of Tacoma, Washington, hereinafter called "Employe," party of the second part, WITNESSETH:

That in consideration of the Employer furnishing employment to the Employe as a conductor—motorman—upon its street railway lines, the Employe agrees as follows, to-wit:

I.

That he will perform said service as conductor—motorman—faithfully and to the best of his ability, exercising his best care and judgment to avoid accidents.

II.

That he will reimburse the Employer for all dam-

ages or injuries to or caused by, the street car he is operating, wherein said damage or injury is due to the negligence of the Employe and in the event that said damage or injury arises from the concurring negligence of one or more other employes, then this Employe agrees to raimburse the Employer his proportionate share of the same.

III.

The Employer, by its Superintendent, shall be the sole judge of the extent of the damage or injury done, and shall also whose fault or negligence produced the same, and what the Employe's proportionate share shall be in cases of the concurring negligence of several employes.

IV.

In the event that the negligence of the Employe is found by the Employer to have resulted in damage or injury, as aforesaid, then such damage or injury shall be paid to the Employer in sums not exceeding .....per cent. of the wages of the Employe during each and every succeeding calendar month, said per cent. being deducted from the Employe's wages as they accrue. In case the Employe leaves the service of the Employer before the amount of the aforesaid damage or injury shall have been fully paid to the Employer, then the Employer shall retain from the wages or other moneys due the Employe, a sufficient sum to cover the balance due on said damage or injury.

IN WITNESS WHEREOF the Employer has caused this agreement to be executed by its officer

thereunto duly authorized, and said Employer has affixed his signature, the day and year first above written.

TACOMA RAILWAY & POWER COMPANY
By J. W. ROBERTS.

Witnesses:
GEORGE HENDRY.

"FILED in the U. S. District Court, Western District of Washington, Southern Division. OCT. 31, 1913.

FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

No. 1262

Assignment of Errors

Comes now the plaintiff, M. G. Henry, and files the following Assignment of Errors upon which he well rely upon his prosecution of his Writ of Error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause:

I.

That the Honorable District Court of the United States, Western District of Washington, Southern Division, erred in rejecting the testimony of said plaintiff that, in consequence of the injury of which he complains in this action, while walking upon the public streets, he would slide or shoot toward people, who would stick out their elbows and dig him in the side, and that, several times, "miserable whelps" had actually struck him hard.

II.

That said District Court erred in refusing to per-

mit the witness OWEN A. ROWE to answer the following questions, viz:

"Will you state whether, in your opinion, prior to this accident, Mr. Henry was a good bond buyer?"

III.

That said District Court erred in excluding the testimony offered to be given by the witness OWEN A. ROWE to the effect that the plaintiff was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars.

IV.

That said District Court erred in refusing to permit the witness Mrs. M. G. HENRY to testify concerning what was said to her by plaintiff in the evening following the accident on his arrival home in Seattle, concerning the cause of his condition at that time.

V.

That said District Court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz:

"Is that interest to continue?"

VI.

That said District Court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?"

VII.

That said District Court erred in rejecting the testimony of the witness H. P. PRATT, offered by plaintiff, that, "by reason of plaintiff's condition—his inability to do business and to travel about as demanded by the business" of the firm of which plaintiff and the witness were members, "matters have progressed to a point where they," the other members of the firm, "have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time, when he must sever his connection with" the business of the firm, as bearing upon the measure of damages resulting from said injuries.

VIII.

That said District Court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Assignment of Error No. VII, above, as follows, viz:

"There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carried others around for pleasure excursions, himself. Counsel must be careful and not be continually fluttering around the border line of what is objectionable, in trying to get it in one way or another."

IX.

That said District Court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Assignment of Error Nos.

VII and VIII, above set forth, as follows, viz:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by this offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it; and, therefore, the remark was made."

X.

That said District Court erred in refusing to permit the witness MARTIN MATHIESON to answer the following question, viz:

"I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?"

XI.

That said District Court erred in rejecting the plaintiff's offer to prove by the witness ALBERT OLSON that he had also signed the form of agreement contained in defendant's Exhibit G, and referred to in the foregoing Assignment of Error No. X.

XII.

That said District Court erred in denying the plaintiff's petition for a new trial for the following cause materially affecting his substantial rights in said action, viz: Errors in law occurring at the trial, and duly excepted to, as specified in the foregoing Assignment of Error Nos. I, II, III, IV, V. VI,

VII, VIII, IX, X and XI, and each of them.

Wherefore, the said plaintiff and plaintiff in error prays that the judgment of the Honorable District Court of the United States, Western District of Washington, Southern Division, be reversed, and such directions be given that full force and efficacy may inure to plaintiff by reason of the cause of action set up in his complaint filed in the cause.

ANTHONY M. ARNTSON,
and
T. W. HAMMOND,
Attorneys for Plaintiff and Plaintiff in Error.

Filed in the U. S. District Court Western District of Washington, Southern Division, July 17, 1914.
FRANK L. CROSBY, Clerk.
By F. M. Harshberger, Deputy.

Service of the above and foregoing Assignment of Errors is hereby acknowledged by receipt of a copy thereof this 17th day of July, 1914.

JNO. A. SHACKLEFORD,
Attorneys for Defendant.

"FILED in the U. S. District Court for the Western District of Washington, Southern Division, July 17, 1914.
FRANK L. CROSBY, Clerk.
By F. M. Harshberger, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

No. 1262

Petition for Writ of Error

The plaintiff, M. G. Henry, feeling himself aggrieved by the verdict of the jury and the judgment entered thereon, in the above entitled cause, comes now by Anthony M. Arntson and T. W. Hammond, his attorneys, and complains that in the record and proceedings had in said cause, and in the rendition of said judgment in said District Court of the United States, for the Western District of Washington, Southern Division, manifest error hath happened to the great damage of said plaintiff, and petitions this Honorable Court for an order allowing said plaintiff to prosecute a Writ of Error to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said Writ of Error, and that the judgment heretofore entered herein be superseded and stayed pending the determination of

said cause in the said Circuit Court of Appeals. And your petitioner will ever pray.

ANTHONY M. ARNTSON
and
T. W. HAMMOND,
Attorneys for Plaintiff.

Service of the within and foregoing Petition for Writ of Error is hereby acknowledged by receipt of a copy thereof this 17th day of July, 1914.

JNO. A. SHACKLEFORD,
Attorneys for Defendant.

"Filed in the U. S. District Court for the
Western District of Washington,
Southern Division, July 17, 1914.
FRANK L. CROSBY Clerk.
By F. M. Harshberger, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

No. 1262

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

Order Allowing Writ of Error

Upon motion of Anthony M. Arntson and T. W. Hammond, attorneys for the above named plaintiff, and upon filing a petition for a Writ of Error and an Assignment of Errors, it is

ORDERED that a Writ of Error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and hereby is fixed at $500.00, to be given by said plaintiff, and that on the giving of said bond said judgment heretofore rendered shall be superseded pending the determination of said cause in said Circuit Court of Appeals.

In witness whereof the above order is granted and allowed this 17th day of July, 1914.

(Sig.) EDWARD E. CUSHMAN,
Judge.

FILED
IN THE U. S. DISTRICT COURT
Western Dist. of Washington
Southern Division
Jul 17 1914
FRANK L. CROSBY, Clerk
By F. M. HARSHBERGER, Deputy

Service of the foregoing Order Allowing Writ of Error is hereby acknowledged by receipt of a copy thereof this 17th day of July, 1914.

JNO. A. SHACKLEFORD,
Attorneys for Defendant.

"FILED in the U. S. District Court for the Western District of Washington, Southern Division, July 17, 1914.
FRANK L. CROSBY, Clerk.
By F. M. Harshberger, Deputy."

In the District Court of the United States for the Western District of Washington, Southern Division.

M. G. HENRY,

Plaintiff,

vs.

TACOMA RAILWAY & POWER COMPANY, (a corporation),

Defendant.

No. 1262

Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS: That we, M. G. Henry, as principal, and Maryland Casualty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the Tacoma Railway & Power Company, a corporation, the defendant in the above entitled action, in the sum of Five Hundred and no Dollars ($500.00), for which sum well and truly to be paid to the said Tacoma Railway & Power Company, a corporation, its successors and assigns, we bind ourselves and our executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 17th day of July, A. D. 1914.

The condition of this obligation is such that whereas the above named plaintiff, M. G. Henry,

has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause by the District Court of the United States for the Western District of Washington, Southern Division, and whereas the said M. G. Henry desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit;

Now, therefore, the condition of this obligation is such, that if the above named M. G. Henry shall prosecute said Writ of Error to effect and answer all costs and damages awarded against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Seal) M. G. HENRY.

MARYLAND CASUALTY COMPANY.

By GEO. W. FOWLER,

Agent.

Countersigned by R. S. HOLT,

Its Attorney in Fact.

Approved this 18th day of July, A. D. 1914.

(Signed) EDWARD E. CUSHMAN,

Judge.

Service of the foregoing Bond on Writ of Error by receipt of a copy thereof is hereby acknowledged on this 17th day of July, 1914.

JNO. A. SHACKLEFORD,

Attorney for Defendant.

"FILED in the U. S. District Court for the Western District of Washington, Southern Division, July 18, 1914.
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

United States District Court of Appeals, for the Ninth Circuit.

M. G. HENRY, Plaintiff in Error,

vs.

TACOMA RAILWAY & POWER COMPANY, (a corporation),
Defendant in Error.

Writ of Error

UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between M. G. Henry, plaintiff in error, and Tacoma Railway & Power Company, a corporation, defendant in error, a manifest error hath happened,

to the great damage of the said M. G. Henry, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, in said Circuit, on thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 17th day of July, A. D. 1914.

(Seal of the United States District Court,
Western District of Washington.)

(Signed) FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington, Southern Division.
By E. C. Ellington, Deputy Clerk, U. S. District Court, Western District of Washington.

Allowed by:

Service of the within Writ of Error and receipt of a copy thereof is hereby admitted this 17th day of July, 1914.

JOHN A. SHACKLEFORD
Attorneys for Defendant in Error.

"FILED in the U. S. District Court, Western District of Washington, Southern Division, JUL 17, 1914.

FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

Citation

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, to Tacoma Railway & Power Company, (a corporation), Defendant in Error, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the court room of said Court, in the City of San Francisco, in the State of California, within thirty days from the date of this citation, pursuant to Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein M. G. Henry is plaintiff in error and you, the said Tacoma Railway & Power Company, are defendant in error, to show cause, if any there be, why the judgment in

the said Writ of Error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS THE HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 17th day of July, A. D. 1914.

(Seal of the United States District Court,
Western District of Washington.)

(Signed) EDWARD E. CUSHMAN,
Judge of the United States District Court
for the Western District of Washington,
Southern Division.

Service of the above and foregoing Citation is hereby acknowledged this 17th day of July, A. D. 1914.

JNO. A. SHACKLEFORD,
Attorneys for Defendant in Error.

"FILED in the U. S. District Court
Western District of Washington,
Southern Division, JUL 17, 1914.
FRANK L. CROSBY, Clerk.
By F. M. HARSHBERGER, Deputy."

Clerk's Certificate

UNITED STATES OF AMERICA,
WESTERN
DISTRICT OF WASHINGTON. } SS.

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above entitled cause as the same remains of record and on file in my office, in said District, at Tacoma, and that the same constitutes the return on the annexed Writ of Error.

I further certify that I attach hereto and herewith transmit the original Writ of Error and original Citation, together with original exhibits: Defendant's "A" (photo) and Defendant's "C" (Blue Print).

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by or on behalf of the Plaintiffs in Error for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905) for making record, certificate or return, 334 folios @ 30c.....$100.20

Certificate of Clerk to transcript of rec-

ord and original exhibits, 3 folios @ 30c ..... .90

Seal to said certificate..... .40

Statement of the cost of printing said transcript of record, collected and paid $142.00

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Tacoma, in said District this 25th day of July, A. D. 1914.

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger
Deputy Clerk.